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HUMAN RIGHTS OF INDIGENOUS PEOPLES

Study on treaties, agreements and other constructive arrangements between States and indigenous populations

Final report by Miguel Alfonso Martínez, Special Rapporteur

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Introduction

1. In volume V (Conclusions, proposals and recommendations) 1/ of his monumental Study of the Problem of Discrimination against Indigenous Populations, Mr. Martínez Cobo stressed the paramount importance for indigenous peoples and nations in various countries and regions of the world of the treaties concluded with present nation-States or with the countries acting as colonial administering Powers at the time in question.

2. He concluded that a thorough and careful study should be made of various areas covered by the provisions of such treaties and agreements, the official force of such provisions at present, the observance, or lack of observance, of such provisions, and the consequences all that might entail for indigenous peoples and nations parties to such treaties or agreements.

3. He further noted that in preparing such a study, account must necessarily be taken of the points of view of all parties involved, a task requiring the examination of a large volume of documentation. For obvious reasons, that was an undertaking that could not be carried out within the framework of his own study.

4. He therefore recommended that a thorough study devoted exclusively to that subject should be undertaken in the light of existing principles and norms in the field and the opinions and data submitted by all interested parties, primarily the Governments and indigenous nations and peoples that had signed and ratified treaties or agreements. He believed that only a thorough study could help determine with the necessary accuracy the present status of international agreements involving indigenous peoples. 2/

5. Taking up an initiative of its Working Group on Indigenous Populations, 3/ at its thirty-ninth session, the Sub-Commission on Prevention of Discrimination and Protection of Minorities acted upon Mr. Martínez Cobo's recommendation by adopting resolution 1987/17 of 2 September 1987, entitled "Study on treaties concluded between indigenous peoples and States". In taking such action, the Sub-Commission was consistent with its resolution 1984/35 A of 30 August 1984, in which it had decided to consider Mr. Martínez Cobo's conclusions, proposals and recommendations as an appropriate source for its future work on the question of discrimination against indigenous populations and for the work of its Working Group on Indigenous Populations.

6. In its resolution 1987/17, the Sub-Commission requested Mr. Miguel Alfonso Martínez to prepare, on the basis of the opinions and data in Mr. Martínez Cobo's report and the views expressed on the issue in the Working Group and in the Sub-Commission, a document analysing the general outline of such a study and the juridical, bibliographical and other information sources on which such a study should be based, and to submit the document to the Sub-Commission for consideration at its fortieth session.

7. The Sub-Commission also recommended that the Commission on Human Rights recommend, in turn, that the Economic and Social Council authorize the Sub-Commission to appoint Mr. Alfonso Martínez as Special Rapporteur with the

mandate of preparing such a study, and to request the Special Rapporteur to present a preliminary report to the Sub-Commission at its forty-first session (1989). The recommendations contained in resolution 1987/17 were submitted to the Commission on Human Rights for consideration at its forty-fourth session (1988).

8. At its forty-fourth session, the Commission adopted resolution 1988/56, in which a number of guidelines on the matter were established. These would eventually become the terms of reference of the Special Rapporteur's mandate for the present study.

9. It should be noted that in adopting resolution 1988/56, the Commission broadened to a considerable extent the scope of the study originally envisaged by the Sub-Commission in its resolution 1987/17, by recommending that the Economic and Social Council authorize the appointment of Mr. Alfonso Martínez as Special Rapporteur of the Sub-Commission with the mandate of preparing "an outline on the possible purposes, scope and sources of a study to be conducted on the potential utility of treaties, agreements and other constructive arrangements between indigenous populations and Governments for the purpose of ensuring the promotion and protection of the human rights and fundamental freedoms of indigenous populations" (Emphasis added).

10. However, in resolution 1988/56 the Commission only authorized the Special Rapporteur to prepare and submit to the Working Group an outline of a possible study, not to undertake the study proper, as recommended by the Sub-Commission. In fact, it withheld its authorization, at least until 1989, in order to decide on the appropriateness of commissioning such a study by the Special Rapporteur.

11. Commission resolution 1988/56 was endorsed on 27 May 1988 by the Economic and Social Council in its decision 1988/134.

12. The Special Rapporteur submitted the requested outline 4/ to the Working Group and the Sub-Commission later in 1988. Both bodies endorsed that document. In addition, in its resolution 1988/20 of 1 September 1988, the Sub-Commission requested the Commission and the Economic and Social Council to finally authorize the Special Rapporteur to undertake the study referred to in Commission resolution 1988/56.

13. At its forty-fifth session, the Commission adopted, without either a debate or a vote, resolution 1989/41 of 6 March 1989, in which it endorsed all the recommendations submitted on the matter by the Sub-Commission in its resolution 1988/20. They were thus submitted to the Economic and Social Council for approval at its 1989 spring session.

14. Finally, the Council, in its resolution 1989/77 of 24 May 1989, confirmed the appointment of Mr. Alfonso Martínez as Special Rapporteur and authorized him to carry out the study.

15. Since that date, the Special Rapporteur has submitted to the Working Group and the Sub-Commission a preliminary report, 5/ and three progress reports. 6/

16. At its forty-ninth session, the Sub-Commission, in its decision 1997/110 of 22 August 1997, urged the Special Rapporteur to submit his final report in due time - preferably before the end of 1997 - so as to allow it to be discussed by the Working Group at its sixteenth session and by the Sub-Commission at its fiftieth session, in 1998. The present final report is submitted to the consideration of both bodies, pursuant to the above-mentioned decision of the Sub-Commission.

17. As to the contents of this final report, it should be recalled, first, that the Special Rapporteur suggested from the start of his mandate a three-part structure for the study as a whole:

(i) In the first part, the origins of the practice of concluding treaties, agreements and other constructive arrangements between indigenous peoples and States, that is, the role of treaties in the history of European expansion overseas, were to be examined.

(ii) The second part was to be devoted to the contemporary significance of such instruments, including questions regarding the succession of States, national recognition of treaties and the views of indigenous peoples on these issues.

(iii) The third part would address the potential value of all those instruments as the basis for governing the future relationships between indigenous peoples and States. Both the form and substance of such instruments were to be considered in the final stage of the study, as well as possible mechanisms to be institutionalized in the future to secure their implementation. 2/

18. This final part, obviously, had to be undertaken in the light of the actual situations in which indigenous peoples find themselves coexisting today with other, non-indigenous segments of society in many States. It is the precarious nature of their existence almost everywhere that is today provoking - as it did when Martínez Cobo's study was commissioned and completed - growing concern in the international community.

19. The Special Rapporteur's research and analysis largely follow his initial plan as far as the first two parts of the study are concerned.

20. At this final stage of the Special Rapporteur's work on the study, particular attention will be given to the potential value of all possible ways and means of achieving a new relationship between the indigenous and non-indigenous sectors in multi-national societies through adequate forward-looking, innovative mechanisms that would facilitate conflict resolution when needed.

21. The fact that the Special Rapporteur has been working on this study for nine years and that the present, final report, should be able to stand on its own with respect to publication by the United Nations has made certain inclusions necessary. The Special Rapporteur has therefore briefly recapitulated here the most important provisional conclusions advanced in previous progress reports, as well as the initial (or modified) reasoning behind them. He has also referred to key cases or general situations reviewed

fully in those reports. Without this background it would be difficult to grasp fully the sense and possible merit of the conclusions and recommendations offered here.

22. Consequently, chapter I deals with four main topics: the process of selection (or elimination) of cases relevant to this study; treaty and treaty-making concepts; the importance of fully understanding the evolution of the indigenous/non-indigenous relationship and its present status and defining and differentiating between the categories "indigenous peoples" and "minorities". In chapter II, the Special Rapporteur offers his views on the three juridical situations selected for their pertinence to the goals of this study, focusing on the individual cases/situations selected for review in consideration of their juridical/institutional development. Chapter III describes the overall process of domestication of indigenous issues in its various manifestations during different stages and links it to the present situation of indigenous societies. Finally, in chapter IV, the Special Rapporteur brings all the elements included in previous chapters together, to offer his conclusions and recommendations for what he considers might be a constructive future approach.

23. Lastly, a final remark about the contents of this report. The Special Rapporteur is fully aware that he - and only he - is ultimately responsible for the content of the conclusions and recommendations of the present study. However, he is also aware that all human endeavour may contain flaws and shortcomings, and thus can benefit from constructive criticism.

24. In this context, it cannot be overemphasized that in many aspects and cases reviewed, the final result of these long years of work, as reflected in the present document, is based on the research (including field work), the personal and professional experience, and, in particular, the views on the available sources that have been developed by two persons only: the Special Rapporteur himself and his consultant, Dr. Isabelle Schulte-Tenckhoff - to whom he once again expresses his gratitude for her invaluable collaboration.

25. Hence, the Special Rapporteur will highly welcome all critical opinions - not only from his colleagues but also, in particular, from those indigenous peoples and Governments which did not respond to his questionnaire - that may be proffered during the debate that will be held on the subject of this final report at the forthcoming 1999 sessions of both the Working Group and the Sub-Commission. These contributions will be duly taken into account for potential utilization as additional elements of judgement to be incorporated in this report before it becomes an official United Nations publication.

26. In this final report, the Special Rapporteur wishes to express gratitude to all the Governments that responded to the questionnaire sent them in 1991 and 1992; in particular those of Australia and Canada for the thoroughness with which they did so and the valuable documentation provided either at their own initiative or upon request. He also thanks the Governments of Canada, Chile, Fiji, Guatemala, New Zealand, Spain and the United States of America, for granting facilities for field research or for participation in activities relating to indigenous questions in their respective countries.

27. The careful attention and efficiency with which the New Zealand authorities prepared and coordinated the Special Rapporteur's programme of activities during his official working visit to that country in May 1997, and the fact that some of its highest authorities (for example, the Ministers of Foreign Affairs and Justice) were gracious enough to find time to receive him personally and discuss issues affecting the Maaori people, merit his special recognition.

28. This study could not have been concluded without the cooperation of many indigenous peoples, organizations and authorities, who have offered the Special Rapporteur, not only their invaluable contributions (oral and written testimony, documentation and much needed logistics of the most varied kind), but also constant encouragement in his work.

29. Even at the risk of possible regrettable omissions, it is fitting to mention here the support received from the following indigenous organizations and institutional bodies: American Indian Law Alliance, Four Nations of Hobbema, Fund of the Four Directions, Grand Council of the Haudenosaunee Confederacy, Consejo de Todas las Tierras de la Nación Mapuche, Grand Council of the Crees (of Québec), Fundación Rigoberta Menchú, International Indian Treaty Council, Assembly of First Nations (Canada), Western Shoshone National Council (United States), Maaori Legal Services, Teton Sioux Treaty Council, Ka'laui Hawaii, International Organization of Indigenous Resource Development, OXFAM and the Information and Documentation Centre on Indigenous Peoples (DOCIP) (Geneva).

30. The Special Rapporteur wishes to express his gratitude also to the authorities (elders, lonkos, Grand Chiefs and Chiefs, headmen, councillors and advisers) of diverse indigenous nations/peoples or their organizations, among them Rigoberta Menchú Tum (Maya Nation), the late Oren Lyons (Onondaga Nation), Matthew Coon Come and Ted Moses (Crees [of Québec]), Tony Blackfeather (Teton Sioux/Lakota Nation), J. Wilton Littlechild (Four Nations of Hobbema/Canada), Domingo Cayuquo, Manuel Antilao, Jorge Pichinual, Juana Santander and Aucan Huilcamán (Mapuche Nation), Ovide Mercredi (Assembly of First Nations/Canada), Cherrilene Steinhauer and Carl Queen (Saddle Lake First Nation/Canada), Wallace Fox (Onion Lake First Nation/Canada), Daniel Sansfrere, Michael Nadli, Felix Lockhart, Pat Martel, Jonas Sangri, Rene Lamothe, Gerald Antoine and Francois Paulette (Dene Nation/Canada), Sharon Venne (Lubicon Cree Nation-Joseph Bighead First Nation-Treaty Six Nations/Canada), Juan León (Maya Nation), the late Ingrid Washinawatok (Fund of the Four Directions), Ken Deer (Mohawk Nation), Lázaro Pari (Aymará Nation), Bill Means, Antonio González, Jimbo Simmons and Andrea Carmen (IITC), Mililani Trask (Hawaii), Al Lameman (Beaver Lake Tribal Administration), Kent Lebsock (American Indian Law Alliance), R. Condorí (CISA), Pauline Tiangora, Naniko, Aroha Pareake Meade, Moana Jackson, Dr. Margaret Mutu, Sir Tipene O'Regan, Sir R.T. Mahuta, Moana Erickson and Shane Solomon (Aotearoa/New Zealand), and Leif Dunfield (Saami Nation). All of them gave the Special Rapporteur most valuable information and insights on their respective peoples/nations and organizations.

31. The Special Rapporteur cannot leave unmentioned his gratitude to other indigenous and non-indigenous individuals - all with recognized authority in diverse aspects of the indigenous problematique and active, in general, in

United Nations circles - who have lent their knowledge, practical experience, and/or incisive, constructive criticism to the Special Rapporteur's work.

32. Gudmundur Alfredsson (both in his past functions in the Centre for Human Rights and in his capacity as a scholar specializing in this question), Augusto Willemsen Díaz, Chief Justice E. Durie (of the Waitangi Tribunal), Mario Ibarra, Jacqueline Duroure, the late Andrew Gray, Paul Coe, Renate Dominick, Robert Epstein, Florencia Roulet, Sir Paul Reeves, Anthony Simpson, Alberto Saldamando, and Professors Vine Deloria, Héctor Díaz Polanco, Michael Jackson, Gaston Lyon, Glenn Morris, C.M. Eya Nchama, Douglas Sanders, Mason Durie, Jim Anaya, José Bengoa (his colleague in the Sub-Commission) and the late Howard Berman merit special thanks for their worthy academic contributions. None of them, of course, bear any responsibility whatsoever for the possible flaws in the various progress reports or in this final report of the study.

33. Last but not least, the Special Rapporteur expresses heartfelt gratitude for the specialized assistance, patience and logistical cooperation provided by all those who have served on the minuscule unit/task force to which the Centre for Human Rights or the Office of the High Commissioner for Human Rights has assigned responsibility for indigenous affairs. The diligence and the extreme professionalism with which they so effectively fulfilled their functions in terms of this study (sometimes under extremely trying conditions) have been simply exemplary. In this regard, their head, Mr. Julian Burger and his highly efficient colleague, Ms. Miriam Zapata have, over long years, earned the total respect of the Special Rapporteur.

I. SOME KEY POINTS OF DEPARTURE

34. Given the vast geographical, temporal and juridical scope of the study, 8/ the Special Rapporteur decided from the start to confine detailed analysis to a limited, representative number of case studies ordered according to five juridical situations: (i) treaties concluded between States and indigenous peoples; (ii) agreements made between States or other entities and indigenous peoples; (iii) other constructive arrangements arrived at with the participation of the indigenous peoples concerned; (iv) treaties concluded between States containing provisions affecting indigenous peoples as third parties; and (v) situations involving indigenous peoples who are not parties to, or the subject of any of the above-mentioned instruments. 9/

35. It must be recalled that from the geographical viewpoint, the Special Rapporteur has viewed his mandate as universal, dealing with "any part of the world in which the historical or contemporary existence of treaties, agreements and other constructive arrangements is confirmed, or where they may still come into being in the future through a process of negotiation and cooperation". 10/

36. Consequently, an extensive array of cases from all regions of the world was examined relating to all five juridical situations listed above, including cases in the United States and Canada (Haudenosaunee, Mikmaq, the so-called Five Civilized Tribes, Shoshone, Lakota, the indigenous signatories of Treaty No. Six, the James Bay Cree [of Québec], the indigenous nations of British Columbia and California, the Lubicon Cree), the Pacific (Maaori,

Hawaii, French Polynesia), Latin America (Kuna Yala, Mapuche, Yanomami, Mayal, Aborigines and Islanders of Australia, the Greenland Home Rule, and some African and Asian cases (Burma/Myanmar, the role of European charter companies in South Asia and West Africa, the San of Botswana, the Ainu of Japan and the indigenous peoples of Siberia).

37. It is worth recalling in this connection that some choices were made by the Special Rapporteur concerning the guidelines adopted for the research as a whole. 11/ Those guidelines have been duly taken into account throughout his work.

38. In the course of his work and in light of the numerous cases/situations reviewed, the Special Rapporteur was led to reconsider the relevance for the final report of the five juridical categories listed at the beginning of this chapter

39. Two of those juridical categories, namely, agreements, insofar as these may differ fundamentally from treaties, and treaties between non-indigenous powers affecting indigenous peoples as third parties, will have limited impact on the conclusions and recommendations to be formulated in the present final report.

40. Regarding, first of all, the question of agreements, the Special Rapporteur has already stressed the need for a casuistic approach, since "the decision of the parties to a legal instrument to designate it as an 'agreement' does not necessarily mean that its legal nature differs in any way from those formally denominated as 'treaties'". 12/ This reasoning is consistent with the legal tradition codified into contemporary international law by the Vienna Convention on the Law of Treaties. 13/

41. The Special Rapporteur therefore selected certain factors to be taken into account in determining which of the instruments analysed should be viewed as a "treaty", and which was to be considered an "agreement". These factors are: who the parties to the instrument are, the circumstances surrounding its conclusion, and its subject matter. 14/

42. The factors in question were applied in the analysis of two particular instruments, namely, the Panglong Agreement of 12 February 1947 (Burma/Myanmar), later forgone by the State party; 15/ and the agreement of 22 August 1788 between Captain Taylor on behalf of the British Crown and the Chiefs of Sierra Leone, which does not constitute an instrument of international law relevant to the study. 16/

43. Some elements relating to other, present-day cases or situations labelled as "agreements" - particularly in the Canadian context - will be reviewed in chapter III of this report.

44. Secondly, regarding the relevance, for this study, of bilateral and multilateral treaties binding non-indigenous powers but affecting indigenous peoples as third parties, it should be stressed that lack of time and resources have prevented the Special Rapporteur from ascertaining in situ the practical import of those instruments for indigenous peoples and from further examining the existing documentation on the instruments.

45. Nonetheless, at least one instrument already considered in the first progress report 12/ clearly continues to be relevant, namely the so-called Lapp Codicil to the 1751 border treaty between Sweden/Finland and Norway/Denmark. This Codicil has never been abrogated and continues to be the subject of legal interpretation regarding Saami rights within the context of bilateral (Sweden/Norway) negotiations.

46. In this connection, it is worth underscoring the role of the Saami parliament in both Norway and Sweden - but especially in Norway where it seems to have a stronger impact than in Sweden - and their potential contribution to the interpretation of the Codicil.

47. In addition, regarding specifically the 1989 ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, it remains to be seen to what extent indigenous peoples have any direct access to (or possible effective input into) the processes leading to the ratification of this Convention by the States in which they live. It is worth noting that to date only a very limited number of those States have actually ratified this instrument.

48. Although support for the Convention has been expressed by a number of indigenous organizations (for example, the Inuit Circumpolar Conference, the National Indian Youth Council and the Saami Council), that support is far from being unanimous. The opposition to it by a number of indigenous organizations in the Canadian context is proof of this. In Canada, for instance, not all indigenous peoples - nor all sectors of the legal establishment - support ratification of the Convention, since its provisions appear to lag behind current national standards. In other countries, where existing legislation regarding indigenous peoples - or the indigenous labour force, for that matter - is less advanced, indigenous peoples may take a different stand. Yet again, a case-by-case approach is called for.

49. It follows that the issue of treaties affecting indigenous peoples as third parties may continue to be relevant insofar as they remain in force and insofar as indigenous peoples already participate - or may in the future - in the implementation of their provisions. Among the 10 instruments previously considered for analysis, 13/ apart from the Lapp Codicil, several others would warrant further scrutiny, among them the 1794 Jay Treaty and the 1848 Treaty of Guadalupe-Hidalgo, both of apparent special significance for the indigenous nations along the borders of the United States with Canada and Mexico respectively.

50. Consequently, the conclusions and recommendations to be offered in the present report will mainly refer to three of the five juridical situations originally identified: (i) where there is proof of international treaties/agreements between indigenous peoples and States, (ii) where there are no specific bilateral legal instruments to govern relations between indigenous peoples and States; and (iii) situations relating to the question of "other constructive arrangements".

51. As to the role of these constructive arrangements, the Special Rapporteur notes that activities currently being undertaken at the national level - for example, in Mexico, Canada and Guatemala under different social

and political conditions - clearly illustrate some of the fundamental problems he has been led to raise in the course of his mandate, notably the issue of collective rights for indigenous peoples in today's pluri-ethnic societies and the need in that context for mutually agreed conflict-resolution mechanisms. 19/

52. Also in connection with the three situations outlined above, it must be stressed that treaties themselves and treaty-making (in the broadest sense of this term) are matters that, in the view of the Special Rapporteur, require further conceptual elaboration.

53. The Special Rapporteur is of the opinion that one should avoid making oneself a prisoner of existing terminology. This does not preclude in any way, however, the conclusions to be drawn from a non-Eurocentric historiography of treaties/agreements between indigenous peoples and States and the corresponding status of indigenous peoples in international law - a historiography to which he devoted a crucial section of his second progress report. 20/ There are, basically, two sides to the issue.

54. Firstly, according to the future-oriented aspects of this study, that is, the lessons to be drawn from the study as to the potential for negotiating treaties and other consensual legal instruments and practical mechanisms in order to ensure better relations in the future between indigenous peoples and States, a narrow definition of "a treaty" and "treaty-making" would hinder or pre-empt any innovative thinking in the field. Yet it is precisely innovative thinking that is needed to solve the predicament in which many indigenous peoples find themselves at present.

55. Secondly, such a narrow definition of treaties and treaty-making would impede (or even preclude) any proper account of indigenous views on these issues, simply because of the widely-held rationale that indigenous peoples are not "States" in the current sense of the term in international law, regardless of their generally recognized status as sovereign entities in the era of the Law of Nations.

56. It is worth reiterating that it would be equally erroneous to assume that indigenous peoples have no proper understanding of the nature, formalities and implications of treaties and treaty-making. Some authorities on the issue, however, attribute to them a total lack of understanding of the principles of such instruments and their "codes". Nonetheless, not only bibliographical sources but also direct testimony gathered by the Special Rapporteur from indigenous sources provide ample proof to counter this assumption.

57. It has been brought to his attention from the start of his endeavours that the concept and practice of entering into international agreements - that is, compacts between sovereign entities, whether nations, "tribes" or whatever they choose to call themselves - was widespread among indigenous peoples in the Americas, Aotearoa/New Zealand and elsewhere before the arrival of the European colonizer and continues to be so.

58. In addition, during field research, many indigenous sources (oceans apart) consistently advised the Special Rapporteur that, on a number of

occasions in the course of negotiations, the non-indigenous parties had failed to adequately inform their indigenous counterparts (that is, the ancestors of those indigenous sources) of the cause and object of the compact, frequently drafted only in the European languages and then orally translated. The linguistic difficulties this entailed for the indigenous parties often prevented them from gaining a full understanding of the true nature and extent of the obligations that, according to the non-indigenous version of those texts (or construction of its provisions), they had assumed. This situation was obviously not conducive to free, educated consent by the indigenous parties to whatever compact emerged from those negotiations. It follows, then, that those instruments would be extremely vulnerable in any court of law worthy of its name.

59. The Special Rapporteur is of the opinion that these accounts - particularly in cases involving the cession of territories by indigenous parties - reflect the actual sequence of events, considering, in particular, the inherent inalienable condition of their lands, and the historical situations faced by many indigenous nations.

60. Dealing also with the fundamental principles governing treaty-making and its "codes", Charles Alexandrowicz has demonstrated, using the example of early African treaties with European Powers (or with their successors for that matter), that, while specific concepts regarding power, kingship and other matters of political organization may have differed between the two parties, they nevertheless rarely failed to find common ground as far as those principles were concerned.

61. Among these commonly shared fundamental principles of treaty-making, one finds: the need for mandated representatives to engage in negotiation, basic agreement on the subject matter of treaties, and concepts relating to the need for ratification and the binding power of any type of formally negotiated compact.

62. However, it should be noted that an exhaustive study of the indigenous viewpoint on a number of important aspects of treaties and treaty-making, still remains to be undertaken. Although it falls squarely under the Special Rapporteur's mandate, sufficient resources have not been available for completion of such a task. Nonetheless - in accordance with Martínez Cobo's recommendations - he has endeavoured wherever possible to take proper account of indigenous knowledge and institutional set-up regarding the history of treaties and treaty-making, as well as the lessons indigenous peoples themselves tend to draw from this knowledge with a view to redefining their relationship with the States in which they now live.

63. In more theoretical terms, one might argue that the principle of reciprocity represents a cross-cultural feature of treaty-making. This is also borne out by the understanding which various indigenous parties to treaties perpetuate regarding the basic nature of the treaty relationship.

64. A case in point - but not the only one - is the indigenous understanding of some of the numbered treaties in present-day Canada, which has become easily accessible thanks to recently published research. 21/ In conjunction with the work of the Royal Commission on Aboriginal Peoples in that country, a

large number of accounts of indigenous treaty interpretations have been submitted. Unfortunately, the Special Rapporteur has not had the opportunity to study these accounts in depth. Nonetheless, there is no doubt as to their importance both for the handling of indigenous situations in Canada and his own conclusions in this final report.

65. One final remark on the overall issue of the treaty problematique: it has not been possible for the Special Rapporteur to assess thoroughly all the possible connections between this problematique and the general question of "the human rights of indigenous individuals". Obviously, this is a very different notion from that of "the rights of indigenous peoples", which is much broader in scope and, in fact, includes those individual rights.

66. Regarding the content of this final report and in accordance with the terms of reference of the Special Rapporteur's mandate, the process of "domestication" of all issues relating to indigenous peoples is of singular importance and obviously requires further analysis and elaboration in this final stage of his work. An extensive review of the origin of this process is necessary to gain a full understanding of crucial juridical and socio-economic elements of the present-day situation of these peoples, as manifested in former European settler colonies (and the States which succeeded them) when the relationship originated, and also as it now exists in relevant, today multi-national, States in Latin America, Africa, Asia, the Pacific and northern Europe. Consequently, this question will be dealt with in extenso in the conclusions offered in chapter III of this final report.

67. On the other hand, the process of the domestication of indigenous issues must be set off against that of independence/decolonization in the Latin American, African, Asian and Pacific countries (which differ greatly), since it raises a further and very pertinent issue, namely that of the relevance of the concept of "indigenousness" with reference to any possible case of "State-oppressed peoples", including "minorities", in the particular context of present-day African, Asian and Pacific States.

68. In the latter countries, the era of decolonization brought about a radical change in the concept of the qualifier "indigenous". This was a result of a new political context whose most visible symbol was the emergence of a large number of new States under contemporary international law. Thus, from a conceptual viewpoint, the Special Rapporteur considers it necessary to re-establish a clear-cut distinction between indigenous peoples and national or ethnic minorities. This differentiation of course is not to be construed as implying lack of recognition of those minorities' collective rights as distinct societies.

69. In this connection, it should be noted that in 1991, at the beginning of his work, and in establishing guidelines for his research as a whole, the Special Rapporteur decided to distinguish strictly between "minorities" and "indigenous peoples". 22/ In addition, it should be borne in mind, that in accordance with the criteria adopted by him in 1995 with respect to his future plan of work, in the final phase "the emphasis of the study should be on cases and situations in which the 'indigenous peoples' category is already established beyond any doubt from a historical and modern-day point of view". 23/

70. Years of research and reflection at various levels of the United Nations system, especially by the Commission on Human Rights and its Sub-Commission, have not yielded a generally accepted definition of the term "minority", nor of the qualifiers often associated with it, such as "ethnic" or "national".

71. The significance, on the other hand, of the "working definition" of "indigenous peoples" formulated by Special Rapporteur José Martínez Cobo in the last part of his study, lies in the fact that his Conclusions have been recognized as "an acceptable basis of work" by the Commission and its subsidiary bodies.

72. Nevertheless - as has been argued earlier in the progress reports of this study - in Martínez Cobo's attempt to extend his "working definition" to all cases brought to his attention in the course of his mandate, he tended to lump together situations that this Special Rapporteur believes should be differentiated because of their intrinsic dissimilarities.

73. These dissimilarities hinge on a number of historical factors that call for a clear distinction to be made between the phenomenon of the territorial expansion by indigenous nations into adjacent areas and that of the organized colonization, by European powers, of peoples inhabiting, since time immemorial, territories on other continents.

74. Of particular concern to the Special Rapporteur, vis-à-vis this study, was the fact that, in the context of current United Nations practice and in accordance with existing international legal instruments and standards, the securing of effective international protection of minority rights remains very much confined to the realm of their individual rights. In addition, this overall issue is mainly dealt with as a matter pertaining to the internal jurisdiction of States, thus precluding any alternative approach.

75. Yet, indigenous peoples justly attach considerable importance to the recognition, promotion and securing of their collective rights, that is, their rights as social groups. Equally, they seek the possible establishment of international mechanisms for the resolution of conflicts with State authorities, in particular, in connection with the rights recognized in, or acquired by means, of instruments with acknowledged international status, such as treaties.

76. Consequently, the Special Rapporteur has already expressed the view that indigenous peoples, although they may constitute numerical minorities in a number of the countries in which they now live, are not "minorities" in accordance with United Nations usage and for the purposes of possible practical action on the part of the Organization. 24/ By the same token, ethnic and/or national minorities are not to be considered "indigenous peoples" in the United Nations context.

77. It is worth pointing out that United Nations policy on this point is now well established, especially since 1994 with the establishment of the Working Group on Minorities under the Sub-Commission, by decision of the Economic and Social Council upon the recommendation of both the Commission and the Sub-Commission itself. 25/

78. In the course of his conceptual reflections, the Special Rapporteur was also led to underscore that, in the African and Asian contexts, the problematique of indigenous communities is rarely coextensive with that of the treaty relationship, 26/ although it may well be that, among others, the case of the Maasai is an exception warranting further scrutiny, given their role in the negotiations leading to Kenya's independence.

79. It remains nevertheless true that communities which could be regarded as indigenous in the context of Martínez Cobo's study, given their lifestyles and habitat - but excluding other factors, such as their "indigenousness" condition today as compared with the "indigenousness" of other communities coexisting with them in the post-colonial era in the territory of practically all States on the African and Asian continents - tended not to be parties to treaties or agreements either with the colonial powers or with the States that succeeded those powers after decolonization and independence. 27/

80. It must be underlined, however, that the Special Rapporteur has not been in a position to assess all possible overlaps and contradictions of every treaty-related issue and the overall indigenous problematique in the African and Asian contexts.

81. Moreover in this connection, it can be validly argued that the legacy of "protected" tribal areas in Africa and Asia (especially in regions formerly included in the British colonial empire, for example in India and southern Africa) has raised a number of specific problems - particularly when reflected in the work of some international organizations, such as the International Labour Organization and the Organisation of American States - that has contributed to the confusion on the issue of the well-established, clear-cut minorities/indigenous dichotomy.

82. Despite important lacunae in this respect, the Special Rapporteur has been led to draw some tentative ground rules from these particular issues, in particular regarding the status and situation of indigenous peoples not yet parties to any formal and consensual bilateral juridical instrument.

83. It should be recalled that many representatives of what they describe as State-oppressed groups/minorities/peoples in Africa and Asia have brought their case before the Working Group on Indigenous Populations for lack of other venues for the submission of their grievances. This situation is now being remedied with the establishment of the Working Group on Minorities.

84. It follows that, while their particular situation may qualify as a matter for general consideration within the framework of United Nations activities on the overall issues of the prevention of discrimination and the protection of minorities, its relevance is either tangential, extremely limited, or non-existent in a contemporary context regarding the issue of treaties/agreements and constructive arrangements between indigenous peoples and States - including their role in view of future agreements between indigenous and non-indigenous parties - and particularly for the present study in the light of the terms of reference of the Special Rapporteur's mandate under Commission on Human Rights resolution 1988/56.

85. In this final phase of the study, the emphasis, as explained earlier, is therefore to be only on situations where, in the view of the Special Rapporteur, the category of indigenous peoples has been established beyond doubt.

86. Concerning this important question, the Special Reporter considers it his duty to point out that - as was to be expected - the contents of this last part (paras. 66-85 above) of chapter I of his final report aroused critical reactions on the part of a number of participants in the sixteenth session of the Working Group, in 1998, when the present report was circulated in its unedited version (and in English only) as a working document. Both in their interventions during the debate on the subject and in conversations outside the meeting room, as well as in communications they sent to him later, various participants from Asia and Africa made known to the Special Rapporteur their complete disagreement with the content of the above-mentioned paragraphs.

87. As he had undertaken to do at the end of the debate that took place at the sixteenth session of the Working Group (see E/CN.4/Sub.2/1998/16, para. 102), the Special Rapporteur gave serious consideration to those comments, particularly those contained in the written communications. Leaving aside certain unacceptable (because unsubstantiated) invective contained in some of these communications - such as attributing to him a prevalence of "colonial and possibly even racists values" in his outlook and his methodological approach towards the question - the Special Rapporteur came to the conclusion that the arguments put forward therein were not sufficient to make him alter the basic views set out in the above-mentioned paragraphs of this report; all of which he reiterates on the present occasion.

88. Such reiteration is basically justified, given that in none of the communications he received was a serious counter-argument put forward to refute the obvious fact that in post-colonial Africa and Asia autochthonous groups/minorities/ethnic groups/peoples who seek to exercise rights presumed to be or actually infringed by the existing autochthonous authorities in the States in which they live cannot, in the view of the Special Rapporteur, claim for themselves, unilaterally and exclusively, the "indigenous" status in the United Nations context.

89. As mentioned previously, and given the exclusive character that the term "indigenous" has in this context, other groups, minorities, ethnic groups or peoples who live alongside them on the territory of a present-day multi-national or multi-ethnic African or Asian State - whose (sometimes aberrant) frontiers are the result of a colonial situation, perhaps legally defunct but which continues to cast its shadow on the present - would thus be excluded from this category of "indigenous". These States - whose existence as such is, in the majority of cases, very recent - have not only the right but also the duty to preserve their fragile territorial integrity. The risk to such States of breaking up (or "balkanization") which such unilateral claims to "indigenousness" imply naturally cannot be taken lightly. It should be said that, with perhaps less defensible historical circumstances, many developed States, with centuries of existence as nation-States behind them, demonstrate the same reticence with respect to such a possibility, however remote it might be in fact.

90. To sum up: the Special Rapporteur firmly maintains his view that the situations described above, the scenario of which is African or Asian States, should be analysed in other forums of the United Nations than those that are currently concerned with the problems of indigenous peoples; in particular in the Working Group on Minorities of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

91. It needs to be reiterated also that the Special Rapporteur is not defending the absurd position of denying the existence on the African and Asian continents - as was affirmed in some of those statements and communications - of populations who are ethnic groups, minorities, peoples or autochthonous groups; on the contrary, all of them are. Therefore, except in certain cases mentioned in the present report (or a few others which could be considered in greater depth on the basis of further information), the term "indigenous" - exclusive by definition - is particularly inappropriate in the context of the Afro-Asian problematique and within the framework of United Nations activities in this field.

92. Lastly with respect to several other criticisms of opinions put forward in the present report on this issue, the Special Rapporteur would point out that the great value of, and the respect he has for, the views advanced on the subject by Mr. Martínez Cobo and by the distinguished Chairperson-Rapporteur of the Working Group, Ms. Erika Irene Daes in their respective studies do not mean that he is necessarily obliged to share those views.

II. SUMMARY OF FINDINGS

93. In the three progress reports submitted until now, the Special Rapporteur has endeavoured to address not only the various aspects of the question of treaties between indigenous peoples and States as identified by Mr. Martínez Cobo, 28/ but also those same aspects in connection with agreements and other constructive arrangements as mandated by the Commission and the Economic and Social Council.

94. Those issues are, among others, the areas covered by such instruments, their present-day legal standing, their implementation or lack thereof, and the consequences this might entail for indigenous peoples.

95. These aspects were addressed on the basis of manifold sources and documentation, including the responses received to the two questionnaires circulated twice at the beginning of the mandate; 29/ the results of field and archival research conducted either by the Special Rapporteur or his consultant; and extensive documentation and other materials submitted by interested parties, whether States, indigenous peoples or organizations, scholars and other individuals concerned.

96. The sheer volume and diversity of these documents have led the Special Rapporteur to devote particular attention to the overall approach of the study and its methodological and theoretical challenges. The main approaches taken in this regard were spelled out in his first progress report. 30/ They can be summarized as follows.

97. The Special Rapporteur insisted from the start on the need for a transdisciplinary approach - albeit with a strong juridical focus. 21/

98. Any attempt to explore and understand indigenous representations and traditions regarding treaties, agreements and other constructive arrangements must be carried out so as to favour a decentred view on culture, society, law and history, and to deal critically with ethnocentrism, eurocentrism and the evolutionist paradigm.

99. Moreover, the close connection between the indigenous problematique and the phenomena of colonialism, domination and assimilationist policies had to be thoroughly reviewed and acknowledged. This is a connection also made in the academic disciplines involved (such as anthropology), as well as in the legal discourse and in positive law. 22/

100. There are numerous historical examples of law as an instrument of colonialism, such as the doctrine of terra nullius, the encomienda and repartimiento systems instituted in Latin America by the Spanish Crown in the sixteenth century, the so-called "removal treaties" imposed on the indigenous nations of the south-eastern United States under President Jackson in the 1830s, and various types of State legislation encroaching on (or ignoring) previously recognized indigenous jurisdiction, such as the Seven Major Crimes Act and the Dawes Severalty Act passed by the United States Congress in the 1880s, the federal Indian Act in Canada, post-Mabo legislation in Australia and many pieces of legislation throughout Latin America.

101. Yet, with rare exceptions, the discourses of law itself, including that on treaties and treaty-making in the context of European expansion overseas and that of their successors in the territories conquered, are not impervious to anachronism and ex post facto reasoning, thus condoning discrimination of indigenous peoples rather than affording them justice and fair treatment.

102. A critical historiography of international relations clearly shows the dangers of this particular kind of reasoning, which projects into the past the current domesticated status of indigenous peoples as it evolved from developments that took place mainly in the second half of the nineteenth century under the impact of legal positivism and other theories advocated by European colonial powers and their continuators.

103. In his second progress report, the Special Rapporteur endeavoured, inter alia, to assess the contribution of that historiography to a better understanding of treaties and other legal instruments mutually agreed to by indigenous peoples and States, considering in particular the works of Charles H. Alexandrowicz and other relevant authors. 23/

104. As established above (para. 55), the main finding that emerges from these works relates to the widespread recognition of "overseas peoples" - including indigenous peoples in the current sense of the term - as sovereign entities by European powers and their successors, at least during the era of the Law of Nations.

105. Consequently, the problematique of indigenous treaties and other juridical instruments today affecting the lives of these peoples, hinges on

what the Special Rapporteur has termed a process of retrogression, by which they have been deprived of (or saw greatly reduced) three of the four essential attributes on which their original status as sovereign nations was grounded, namely their territory, their recognized capacity to enter into international agreements, and their specific forms of government. 34/ Not to mention the substantial reduction of their respective populations in many countries around the world, due to a number of factors including, assimilationist policies.

106. This aspect can hardly be overemphasized, especially since the ultimate purpose of the study pertains to the potential utility of yet another process of reversal that would eventually lead toward renewed recognition of indigenous peoples as distinct collectivities, allowing these peoples redress for decades - if not centuries - of discrimination and forced integration.

107. It is against this backdrop that the following summary of the Special Rapporteur's findings regarding the three main categories of juridical instruments retained for study (see para. 93 above) ought to be considered.

A. Treaties/agreements between indigenous peoples and States

108. In his initial research, the Special Rapporteur focused, by force of circumstance, on the situation of former European settler colonies, especially in North America and the Pacific, given the extensive practice of treaty-making in the context of British and French colonial policy.

109. It should be noted that, although the Special Rapporteur affirmed initially that few, if any, treaties could be traced back to colonial times in Latin America, 35/ further research has led him to reconsider this assumption. This modified approach is documented in the third progress report, especially with the example of the Mapuche parlamentos (Chile). At this final stage of his work, the Special Rapporteur is inclined to accept that the origin, causes and development of these juridical instruments can be compared, prima facie and in some aspects, to those of certain indigenous treaties in British and French North America. 36/

110. In establishing formal legal relationships with peoples overseas, the European parties were clearly aware that they were negotiating and entering into contractual relations with sovereign nations, with all the international legal implications of that term during the period under consideration. 37/

111. This remains true independently of the predominance, nowadays, of more restricted, State-promoted notions of indigenous "self-government", "autonomy", "nationhood" and "partnership" - if only because the "legitimization" of their colonization and trade interests made it imperative for European powers to recognize indigenous nations as sovereign entities.

112. In the course of history, the newcomers then nevertheless attempted to divest indigenous peoples, as pointed out above, of their sovereign attributes, especially jurisdiction over their lands, recognition of their forms of societal organization, and their status as subjects of international law.

113. The various ways and means utilized in the process of domesticating relations with indigenous peoples in the context of those former European settler colonies were addressed both in the second progress report (New Zealand, Australia and the unique case of Hawaii) 38/ and in the third progress report (Canada, United States and Chile). 39/ For a more general and detailed review of this process and its consequences, see chapter III below.

114. Nonetheless, it is important to stress at this point that the passage, for indigenous peoples, from the status of sovereign nations to that of State-domesticated entities raised a certain number of questions and posed specific challenges from the point of view of this study.

115. First of all, in the case of treaty relations, one notes a general tendency to contest whether treaties involving indigenous peoples have a standing, nowadays, in international law. This point of view, which is widespread among the legal establishment and in scholarly literature, 40/ has been basically grounded alternatively on three assumptions: either it is held that indigenous peoples are not peoples according to the meaning of the term in international law; or that treaties involving indigenous peoples are not treaties in the present conventional sense of the term, that is, instruments concluded between sovereign States (hence the established position of the United States and Canadian judiciary, by virtue of which treaties involving indigenous peoples are considered to be instruments *sui generis*); or that those legal instruments have simply been superseded by the realities of life as reflected in the domestic legislation of States.

116. Whatever the reasoning followed, the dominant viewpoint - as reflected, in general, in the specialized literature and in State administrative decisions, as well as in the decisions of the domestic courts - asserts that treaties involving indigenous peoples are basically a domestic issue, to be construed, eventually implemented and adjudicated via existing internal mechanisms, such as the courts and federal (and even local) authorities.

117. It is worth underlining, however, that this position is not shared by indigenous parties to treaties, whose own traditions on treaty provisions and treaty-making (or on negotiating other kinds of compacts) continue to uphold the international standing of such instruments. Indeed, for many indigenous peoples, treaties concluded with European powers or their territorial successors overseas are, above all, treaties of peace and friendship, destined to organize coexistence in - not their exclusion from - the same territory and not to regulate restrictively their lives (within or without this same territory), under the overall jurisdiction of non-indigenous authorities. In their view, this would be a trampling on their right to self-determination and/or their other unrelinquished rights as peoples.

118. By the same token, indigenous parties to treaties have rejected the assumption held by State parties, that treaties provided for the unconditional cession of indigenous lands and jurisdiction to the settler States.

119. It is worth noting in this regard that indigenous views on treaties have begun to receive increased attention in some countries, such as Chile, New Zealand and Canada. Thus, in its recent Final Report, the Royal

Commission on Aboriginal Peoples, established by the Government of Canada, recommended that the oral history of treaties, orally transmitted from generation to generation among indigenous peoples, should be used to supplement the official interpretation of treaties based on the written document. 41/

120. Nevertheless, the contradictions one notes regarding the historiography and interpretation of treaties, depending on whether one is dealing with State-promoted views on this matter, the established academic legal discourse or the traditions upheld by indigenous peoples themselves, in their practical consequences undoubtedly create a conflict situation.

121. In addition, these contradictions place a formidable burden on the formulation and realization of future negotiated legal instruments between indigenous peoples and States: the difficulties of negotiating those new instruments without having previously identified and settled key questions need not be stressed.

122. This observation clearly pertains to all treaty/agreement-related issues. One example is the alleged opposition, in the Canadian context, between treaties of peace and friendship (concluded in the eighteenth century and earlier) and so-called numbered treaties of "land surrenders" (especially from the second half of the nineteenth century on). This opposition is contradicted by indigenous parties to numbered treaties, who consider that they are parties to treaties of peace, friendship and alliance and that they did not cede either their territories or their original juridical status as sovereigns. Similar discrepancies are to be noted in the United States and New Zealand.

123. Closer scrutiny of the provisions of treaties concluded between indigenous peoples and States also reveals that in most cases the subject of such treaties is common in international law, whatever the historical period considered; thus such treaties deal with questions of war/peace, trade provisions, prctection of the subjects/citizens of each signatory party, and so forth.

124. Furthermore, while the predominant present-day legal discourse holds that treaties fall primarily within the domestic realm of States, the manner in which treaties are dealt with in municipal law and by the national courts nevertheless also raises a number of questions.

125. In this connection, failure of State parties to comply with, or their violation of, the obligations assumed under existing treaties, the unilateral abrogation of the treaty itself (or parts thereof), via State law or other mechanisms and even the failure of State parties to ratify treaties negotiated with indigenous peoples were problems identified, at an early stage of his work, by the Special Rapporteur regarding the significance of treaties/agreements at the national level.

126. Such problems are, in one way or another, connected with most juridical situations retained by the Special Rapporteur for study; moreover, they are not limited to historical situations but also arise with respect to more modern compacts. 42/

127. It follows that the enforcement and implementation of existing, recognized treaties involving indigenous peoples today can hardly be taken for granted. Furthermore, it remains to be seen what burden this state of affairs places on the modalities of future negotiated agreements between indigenous peoples and States. Obviously, this also has a number of practical consequences for the status and legal personality of indigenous peoples, both at the national and at the international level.

B. Other constructive arrangements

128. Turning now to the quasi-juridical term "other constructive arrangements", it must be recalled that this was defined by the Special Rapporteur from the start as "any legal text or other documents that are evidence of consensual participation by all parties to a legal or quasi-legal relationship". 43/

129. The main example examined under the heading of "other constructive arrangements" concerns the Greenland Home Rule. At the start of his mandate, on the basis of various submissions made by the Greenlandic delegates and the Government of Denmark to the Working Group, the Special Rapporteur thought it appropriate to assess whether the kind of procedure instituted by Denmark in 1979 could be useful for the realization of improved relations between indigenous and non-indigenous parties. 44/

130. His more recent, detailed analysis of Greenland Home Rule, 45/ showed proof, in the view of the Special Rapporteur, that the arrangement in question entails a number of restrictions for the indigenous population of the island, both in terms of the process which led to its establishment and the effects of its provisions. For example, since the Danish Constitution has full effect in Greenland, the Home Rule authorities must abide by all constitutional provisions in crucial fields such as foreign policy and the obligations arising from international agreements entered into by Denmark.

131. This could have had certain grounds of legitimacy - in terms of the real exercise by Greenlanders of the right to self-determination - had the effective input of the indigenous population of Greenland into the formulation and implementation of Home Rule not been limited.

132. The Special Rapporteur is of the opinion that the type of "autonomy regime" provided for under Home Rule does not amount to the exercise of the right to self-determination by the population of Greenland. By the same token, he believes that the way in which the discussions took place between Greenlandic and Danish officials prior to the introduction of Home Rule in 1979 can in no way be described as a constructive example of the full exercise of that inalienable right.

133. In other countries, discussions are currently taking place with a view to establishing (or implementing) autonomy regimes, or adopting measures to recognize a distinct legal status for indigenous peoples, whether these are to be decreed by law or to be enshrined in the national constitution. Prominent examples addressed by the Special Rapporteur concern the Kuna Yala in Panama and the Atlantic region in Nicaragua. 46/ One should also take cognizance of the new developments taking place in Guatemala in the past few years.

134. These autonomy regimes have brought (or may bring) certain advantages to indigenous peoples. For example, in the case of Panama, autonomy has allowed for the recognition by the State of the traditional political authorities of the Kuna Indians, especially the Kuna General Congress, and some control over development policies within the indigenous territory.

135. The Special Rapporteur notes, however, that recognition of "autonomy" for indigenous peoples within the State (whatever powers or restrictions thereto are established), most probably will neither automatically end States' aspirations to exert eventually the fullest authority possible (including integrating and assimilating those peoples) nor nullify whatever inalienable rights these people may have as such.

136. Moreover, the mechanisms through which "autonomy regimes" for indigenous peoples are being formulated and implemented must be assessed, on a case-by-case basis, for proof of free and informed consent by all parties concerned, especially indigenous peoples. 17/

137. Similar concerns might be raised about other juridical situations that could be described by some sources as "constructive arrangements", most prominently the James Bay and Northern Quebec Agreement (Convention in its French version), the first in a series of so-called "comprehensive land claims settlements" in Canada - which were addressed by the Special Rapporteur in his third progress report. 18/

138. These concerns refer to, inter alia, the fact that, in this particular case, treaty negotiations were only set in motion after considerable turmoil in connection with a vast, government-sponsored hydroelectric project. Moreover, the amount of litigation the agreement in question has generated led the Special Rapporteur to ponder very seriously the efficacy of treaty negotiations in a situation of economic, environmental and political duress resulting from one-sided government policies.

139. Given the actual prevalence of the policy of comprehensive land claims settlement in Canada and the avalanche of documentation requiring review in this regard, the Special Rapporteur is not in a position, at present, to hold anything more than tentative views on other cases regarding this particular type of "constructive arrangement".

140. Discussions and negotiations currently taking place in several countries (not only in Canada), warrant further, long-term analysis of the mechanisms envisaged and applied to arrive at a settlement, and the modalities of their implementation. It should be noted in this regard that the completion of several land claims settlements and so-called "modern treaties" in Canada raises a number of interesting issues. Among them is the wide variety of parties (indigenous nations, provincial authorities, and the federal Government) involved in such treaty-making processes.

141. The significance and international relevance of developments in Canada cannot be overstressed, if only because they highlight the importance and

potential utility of establishing sound, equitable "ground rules" for the negotiations required to draft and conclude "constructive arrangements", as well as for the efficient performance of the mechanisms for their practical implementation which are so necessary for developing new approaches to indigenous problems, not only in Canada, but also in all other multi-national countries with the same or similar problems. Indeed, all this will be put to the test in the vast array of "comprehensive land claims settlement" and treaty negotiations that are currently taking place in various regions of Canada, for example, in British Columbia - where a first agreement was reached with the Nishga in 1996 - and in the Northwest Territories - where one notes the particular difficulties encountered by indigenous peoples. Thus, after negotiations with the Dëné nation as a whole broke up in the late 1980s, the State party decided to negotiate with individual bands. To date, two settlements have been reached, namely with the Sahtu and the Gwich'in. 12/

142. Such fragmentation of indigenous entities via the negotiation process also occurred in other cases, for example that of the Lubicon Cree, in which, according to the information available to the Special Rapporteur, a new band was created - under questionable conditions, according to some indigenous sources - to facilitate a partial land claims settlement. To date, however, the Lubicon case itself has not been settled, mainly because the indigenous party is unwilling to accept the complete extinguishment of native title as a prerequisite for settlement.

143. In all situations - whether or not governed by treatries/agreements - the issue of possible extinguishment of indigenous rights to their lands, either by treaty/agreement or "constructive arrangements", is of crucial importance, since it imposes duress on the indigenous party.

144. It follows that the category of "other constructive arrangements", while added belatedly to the mandate of the Special Rapporteur, has revealed itself to be of particular significance as far as how to identify and duly establish solid bases for a new, more equitable future relationship between the indigenous and non-indigenous sectors of society is concerned.

145. At this stage it is important to note that contrary to treaties (especially so-called "historical" treaties), constructive arrangements - and this applies to all examples considered to date under the mandate of the Special Rapporteur - are intended, per se, to be dealt with exclusively within the municipal setting.

146. From the abundant information recently received, in situ, by the Special Rapporteur, it seems clear that in the Canadian context, constructive arrangements such as "comprehensive land claims settlements" and so-called "modern treaties" are basically conceived as a means of settling all outstanding indigenous claims. According to this information, they mostly concern areas in which indigenous peoples are not parties to treaties. In general it remains to be seen in what manner the enforcement and implementation of the provisions of possible constructive arrangements of this type can be ensured, especially for the indigenous parties to such agreements.

C. Situations lacking specific bilateral legal instruments to govern relations between indigenous peoples and States

147. From the start, the Special Rapporteur decided that, in order to fulfil his mandate, it was imperative to review the situation of indigenous peoples that are not parties to any of the instruments covered by the study.

148. Lacking such a review, it would be impossible for him to assess whether or not treaty-making (again, in the broadest sense of this term) can be considered as an appropriate juridical tool to improve the situation of indigenous peoples in general, to set the pattern for eradicating any discriminatory treatment against them and to gradually put an end to the present-day antagonistic nature of the relationship between indigenous and non-indigenous peoples living together in many countries.

149. Regarding the categories of indigenous peoples falling under the present section, the Special Rapporteur identified the following general situations in his first progress report: (a) indigenous peoples who have never entered into consensual relations with any State; (b) indigenous peoples parties to instruments that were unilaterally abrogated - either formally or by way of outright non-implementation - by the State party; (c) indigenous peoples who participated in the negotiation and adoption of instruments that were never ratified by the competent State bodies; and (d) indigenous peoples living in countries where, as the result of an effective process of acculturation, the municipal legislation lacks specific provisions guaranteeing distinct status to them and protection of their rights as peoples.

150. Peoples falling into one or more of these groupings include, of course, those who, because of the lack of recognition of their indigenous status by the State, have been denied any possible redress - either in law or by formal negotiation - in conflict situations relating, precisely, to this status. 12/

151. First and foremost, it must be pointed out that, at present - and with very few exceptions - national and international legal texts having a bearing on the living conditions of indigenous peoples are enacted and enforced by State institutions without direct indigenous input.

152. The cases initially retained for study under this heading included the Aborigines and Islanders in Australia, the Gitksan and Wet'suwet'en in British Columbia (Canada), the Yanomami of Brazil, the indigenous Hawaiians, the Mapuche (Argentina and Chile), the Maya of Guatemala, the Lubicon Cree of Alberta (Canada), the San (Botswana), the Ainu (Japan), the people of the so-called rancherías in California (United States) and the Kuna of Panama.

153. Having completed his research, the Special Rapporteur considers that it may be useful to review the above list, so as to determine - at least provisionally - what would be the most practical and fruitful means (i.e. treaty/agreement renegotiation and/or proper implementation, "constructive arrangement", resort to international bodies, or some other formula) of constructively approaching, in the future, the wide array of current situations confronting those peoples mentioned above.

154. In all cases, the historical development of each of their individual predicaments must be duly considered, since it may provide definite clues as to the suitability of the possible available solutions.

155. It should be stressed, however, that any decision concerning such a solution must be reached with full participation of the indigenous party. No other approach may lead to a much-needed process of confidence-building and thus to consensual legal instruments.

156. The Special Rapporteur has already indicated changes suggested regarding the treaty situation in Latin America.

157. Thus, the Mapuche can be included in the category of peoples who have already participated in a process of treaty-making. Others, like the Kuna, may gain protection through "constructive arrangements", a process that is apparently still ongoing. The case of the Maya and Yanomami are discussed below.

158. Furthermore, at this final stage of his research, the Special Rapporteur is in a position to approach the other cases in question according to the pattern described below.

159. A first series of situations, including those of the Lubicon Cree and the Gitksan and Wet'suwet'en in Canada, should be considered under the category of possible constructive arrangements, provided certain aspects of their situation can be resolved at an early stage in mutually acceptable terms.

160. The case of the indigenous peoples of Australia might be addressed through a process of treaty-making, assuming the Makarrata (or treaty), called for by the indigenous parties since 1980 remains a running issue. 51/ Nevertheless, this Makarrata should also be viewed not only against the backdrop of the so-called reconciliation process launched by the Australian federal Government in 1991 by virtue of the Council for Aboriginal Reconciliation Act, but also in the light of recent judicial and legislative developments, most prominently the Mabo (No. 2) judgement of the Australian High Court (1992) and the Native Title Act enacted at the federal level in 1993.

161. In the case of the rancherias in California, its relevance hinges mainly on the failure of the State party to ratify texts already negotiated with the peoples concerned and should therefore also be considered as a situation of eventual re-emergence and proper implementation of treaties.

162. Considering the above, the Special Rapporteur has been led to believe that other cases of the failure of State bodies to ratify treaties negotiated at some point in history with indigenous parties ought to be re-examined at the appropriate level, with a view to determining the possibility of bringing the ratification process to completion.

163. By virtue of the so-called Apology Bill enacted by the Congress of the United States (P.L. 103-150, of 1993), among other reasons, the situation of

the indigenous Hawaiians takes on a special complexion now. The Apology Bill recognizes that the overthrow of the Hawaiian monarchy in 1898 was unlawful. By the same token, the 1897 treaty of annexation between the United States and Hawaii appears as an unequal treaty that could be declared invalid on those grounds, according to the international law of the time.

164. It follows that the case of Hawaii could be re-entered on the list of non-self-governing territories of the United Nations and resubmitted to the bodies of the Organization competent in the field of decolonization.

165. Still in connection with the list of cases considered above, to the knowledge of the Special Rapporteur, the Yanomami of Brazil, the Maya of Guatemala, the San (Botswana) and the Ainu (Japan) are the only examples of indigenous peoples who never entered into consensual juridical relations with any State.

166. The question of whether, and in what manner, each of these indigenous peoples should seek a negotiated agreement, or any other freely agreed-to formula, with the States in which they now reside remains to be addressed on a case-by-case basis with adequate indigenous input.

167. Particular consideration should be given, in these cases, to the practical day-to-day consequences (sometimes grave) of the lack of such agreements for the juridical and political status of the peoples concerned in the mixed societies in which they now live, and for the preservation, promotion and effective realization of their historical rights as peoples, including their human rights and freedoms.

III. A LOOK AT THE PRESENT: ORIGIN, DEVELOPMENT AND CONSEQUENCES OF THE DOMESTICATION PROCESS

168. In establishing the mandate of the Special Rapporteur, both the Commission on Human Rights and the Economic and Social Council instructed him "(to take into proper account) the social-economic realities of States". 52/ It is therefore imperative for him to review the present-day situation of indigenous peoples now inhabiting multi-national States. However, the current situations cannot be fully understood if the origins and development of the process of domestication of indigenous issues are not examined as well.

169. Any attempt, at the end of the twentieth century, to arrive at a general approach to the vast, complex, and more than 500-year-old problematique of the indigenous peoples, should not - and cannot - ignore a fundamental fact: their initial contacts with "non-indigenous" peoples from other parts of the world, dating back to the late fifteenth century, were the result of the launching and development of European colonial expansion.

170. This expansion was inherent to the new mode of production emerging in Europe during the final part of the late Middle Ages. By the last decade of the fifteenth century, this new economic model had already developed enough scientific, technological and financial wherewithal to allow the successful launching of exploration companies, "discovery" expeditions and colonization in the search for new trade routes and markets in far-off regions. The

theatre of these operations encompassed the Americas, Asia, Africa, the vast expanses of the Pacific and even certain parts of the periphery of Europe itself.

171. At a later stage, other contributing factors to this expansionism were: religious intolerance, oppression based on national origin and the economic and social marginalization of certain sectors of the European population, as well as antagonism and confrontation between the European powers in various epochs. All this would, in later centuries, foster both the establishment of new initial contacts in the hinterlands of the territories "discovered", and the further development and consolidation of the colonial phenomenon as a whole.

172. Despite the surfeit of pious excuses that has been found to justify ethically the launching of this overseas colonial enterprise, and the pseudo-juridical (sometimes even openly anti-juridical) reasoning which has attempted to defend it "legally", there is irrefutable evidence that its clearly-defined goals had nothing either "humanitarian" or "civilizing" about them.

173. Its first raison d'être was to guarantee a permanent presence of the overseas power, either settler populations or mere trading posts, in territories inhabited by other peoples. Secondly, the overseas power sought to acquire the rights to exploit the natural resources existing there and to secure these new markets for the import and export needs. Thirdly, it coveted those new strongholds to strengthen its position in the struggle with other European powers. Finally, it sought to safeguard what had been acquired by imposing its political, social and economic institutions and modalities on the peoples inhabiting these lands.

174. Those goals were to be accomplished at any cost, even - should it be necessary and possible - that of the destruction of often highly advanced cultures, socio-political institutions and traditional economic models developed over centuries by the indigenous peoples.

175. As has been reasoned before in a previous report, submitted in 1995, the overseas colonial undertaking differed completely from the very common phenomenon of expansion into adjacent territories (at the expense of their neighbours) practised by the peoples in those "new" territories before the arrival of the European colonizer. The inherent nature of the colonial undertaking, the exploitative, discriminatory and dominating character of its "philosophy" as a system, the methods employed and the final results it had on very dissimilar societies mark the difference.

176. These dissimilarities have today acquired, as a result of the still unfinished decolonization process, an even greater dimension as far as Asia, the Pacific and Africa are concerned. As a direct result of decolonization, the gap left by the "non-indigenous" colonial political powers in those continents has been filled by population sectors whose "indigenous" (or "autochthonous") condition is indisputable by any of today's standards.

177. It must be borne in mind that, according to all available information, the terms "indigenous", "native", "mitayo", "Indian", "autochthonous populations" and others of a similar cast do not come from the lexicon of those whom we today label "indigenous peoples", but from the vocabulary utilized by the "discoverers"/conquistadorss/colonizers and their descendants, to differentiate themselves - in a relationship of superiority/inferiority - from the original inhabitants of the new territories being added to the European crowns.

178. The initial encounters were, of course, varied in nature. Some were guided solely by the logic of outright force. We must recall that the sword efficiently backed by the cross - has for more than 500 years sealed the fate of tens of millions of the original inhabitants of Latin America and the Caribbean and that of their descendants.

179. The right emanating from force and imposed by it as an instrument of assimilation/marginalization policies was also the basis of the "asymmetrical" bilateral relations between indigenous peoples and the criollos established in the new Latin American republics after independence from Spain and Portugal. The victory of Ayacucho meant little or nothing for the original inhabitants, who simply found themselves subject to the domination of new rulers.

180. This has been, in general, the situation in the Latin American region, both in those countries that were fully colonized before independence was obtained and in those where it was left to the new republic, for example in the cases of Argentina and Chile, to complete domination of the indigenous population, also by force, in every corner of the new State. Only in an extremely limited number of cases (when no way could be found around an effective refusal to submit, as in the parlamentos in the Chilean Araucania) are there vestiges of juridical obligations assumed (although rarely met) with "the Indians" through negotiation and legally binding instruments.

181. However, in other latitudes of the Americas, as well as in other areas of the world, these first contacts were not marked exclusively by military force. On the one hand, this was related to then-predominating political and juridical discourse in the societies from which the outsiders came. On the other, it reflected the balance of forces that originally existed between the newcomers and the well-organized societies that had populated these "new" territories for centuries, a balance that was to change radically as the colonization process progressed.

182. A case in point is Britain's progressive colonization - and that further advanced by its successors in the original 13 colonies (the kernel of the United States) at the end of the eighteenth century - of the vast tracts of land today comprising Canada and the United States. There, a "juridical factor" (i.e. treaties) was introduced. To a certain degree, this form of initial contact can also be seen in the French colonial endeavours in parts of these same territories at that time. During the progressive advance from the Atlantic to the Pacific, military might coexisted with negotiations and juridical instruments as the basis of relations between the colonizer and the indigenous peoples encountered.

183. In the general run of late cases, especially in Africa and in certain areas of the Pacific, the initial colonial presence and implantation also began with a low profile. This can be seen, for example, in British behaviour both in Africa and in New Zealand.

184. In many places, successive waves of settler migration from the metropolis (in the case of Hawaii) or of royal trading companies' representatives (frequent in the "East Indies"), and certain legal modalities (some highly "innovative", such as the "perpetual leasing" of territories) emerged alongside the traditional juridical forms (bilateral agreements and treaties). All, however, sought the same end: to secure colonial domination.

185. These various options were employed according to the needs and possibilities of the alien powers in each specific case, whether the purpose was to formalize, ex post facto, the acquisitions already made or to smooth the path for any future military action that might be required.

186. However, something must be said about the juridical instruments that emerged after the initial contacts in the various periods. Their intrinsic nature, form and content make it clear that the indigenous and non-indigenous parties mutually bestowed on each other (in either an explicit or implicit manner) the condition of sovereign entities in accordance with the non-indigenous international law of the time.

187. It must be stressed that certain States had a very powerful motivation for making these treaties or other international instruments of a contractual nature requiring the consent of participants. Furthermore, this motivation (in the direct interest of the non-indigenous party) was quite clear: to legitimize (via the acquiescence of the autochthonous sovereign of the territories in question) any "right" (real or intended) with which they could counter opposing claims advanced by other colonial powers vying for control of those lands.

188. However, to acquire such "rights" via derivative title (since they clearly lacked original title, or because the legality of their presence in those areas was being questioned), required that they seek the agreement of the legitimate holder of the original title, i.e., the indigenous nation in question. The latter would have to do this by the formal cession of their lands (or their sale, or a concession of acquisitive possession or any other type of valid transfer).

189. In accordance with European legal tradition and formalities, this transfer should appear in a document that could be presented as proof before the colonizing power's equals in the "concert of civilized nations". The ideal instrument for this, according to the international law of the epoch, was the treaty. Furthermore, the only entities with the juridical capacity to make treaties were (like today), precisely, international subjects possessing sovereignty - their own or delegated by other sovereigns - through the exercise of it.

190. In a second phase of the colonization project and until it peaked - during its "classical" manifestation or a variation thereof, and especially as of the second third of the nineteenth century - there was a visible increase

in the use of military force to acquire vast tracts of "new" territories. This shift was very much in line with the enormous power already being wielded by the traditional European imperial powers and by others who emerged later to begin their own expansionism.

191. The newcomers' descendants increased their military and economic capacity. That of the indigenous peoples remained (in the best of cases) the same or (most frequently) decreased rapidly, which resulted in both cases in a growing vulnerability of these peoples to the machinations of the non-indigenous, with whom they had possibly made treaties/agreements, but who now wished to ignore their sovereignty and impose a "new order" on their ancestral homes.

192. Thus began the process that the Special Rapporteur has preferred to call (without any claim to originality) the "domestication" of the "indigenous question", that is to say, the process by which the entire problematique was removed from the sphere of international law and placed squarely under the exclusive competence of the internal jurisdiction of the non-indigenous States. In particular, although not exclusively, this applied to everything related to juridical documents already agreed to (or negotiated later) by the original colonizer States and/or their successors and indigenous peoples.

193. It may be argued that in the light of international law today, and particularly on the basis of Article 2, paragraph 7, of the Charter of the United Nations, such a claim for the reserved domain of domestic jurisdiction could, prima facie, find juridical backing.

194. However, to legitimize beyond any doubt the ways and means used to take issues that originally belonged to the realm of international law away from it and to justify making them subject solely to domestic legislation unilaterally passed by the States and adjudicated by domestic non-indigenous courts, States should produce unassailable proof that the indigenous peoples in question have expressly and of their own free will renounced their sovereign attributes.

195. It is not possible to understand this process of gradual but incessant erosion of the indigenous peoples' original sovereignty, without considering and, indeed, highlighting the role played by "juridical tools", always arm in arm with the military component of the colonial enterprise.

196. In practically all cases, both in Latin America and in other regions mentioned above, the legal establishment can be seen serving as an effective tool in this process of domination. Jurists (with their conceptual elaborations), domestic laws (with their imperativeness both in the metropolis and in the colonies), the judiciary (subject to the "rule of [non-indigenous] law"), one-sided international law (its enforcement assured by military means) and international tribunals (on the basis of existing international law) were all present to "validate" juridically the organized plunder at the various stages of the colonial enterprise.

197. There are abundant examples of this: the 1898 Joint Resolution under which the U.S. Congress, after using force to impose a treaty, consummated the outright annexation of the sovereign State of Hawaii (which had manifold international juridical relations with other "civilized" nations), and the

"scramble for Africa" formalized at the 1885 Berlin Congress by the colonial powers of the epoch are just two of the many examples. Others also supporting this assertion can be found in the progress reports submitted earlier by the Special Rapporteur.

198. The concept of the "rule of law" began to traverse a long path, today in a new phase, towards transformation into "the law of the rulers".

199. Yet, one cannot fail to mention the role played by decisions taken by some indigenous peoples themselves in this same process of domestication, most of them, however, taken under extremely difficult conditions or in a clear "state of necessity", to use a juridical expression.

200. Nevertheless, the Special Rapporteur has chosen to state his views on this matter keeping very much in mind the forward-looking aspects of his mandate, and highly aware of the significance of the lessons to be drawn from history, mutatis mutandis, in the process of building a new, more just, and solid relationship of coexistence between the indigenous and non-indigenous sectors in a considerable number of modern societies. History is an excellent source of knowledge for shaping political action. To ignore history would make it incredibly difficult to understand fully the present, and practically impossible to face the future wisely.

201. In this context, let it be said that the Special Rapporteur's historical research has shown, in his view, that not all indigenous nations made the wisest choices at all times. That is to say, at some crucial moments in their history, some indigenous nations were not capable of putting the need to unite among themselves over their individual interests, even though unity was necessary to confront properly encroachment on their sovereign attributes. This was true even when the ultimate intentions of the newcomers were already apparent. The terrible consequences inherent in allowing themselves to be divided appear not to have been totally perceived.

202. In addition, on more than one occasion they seem not to have recognized the advantages and disadvantages, in all their dimensions, nor the final consequences, of a policy of alliance with European powers. This can be said both of those who adopted this policy in line with their ongoing fratricidal struggles and of those who decided to favour one of the non-indigenous powers over the others in the military confrontations that took place in their ancestral lands.

203. Further, it is also apparent that they could not fully appreciate (or that they widely underestimated) the questionable role played, and still played in many cases, by religious denominations or their representatives as effective instruments of the colonial enterprise in its various stages.

204. It is easy to see the negative effects for indigenous peoples of such a combination of endogenous and exogenous factors, not only on their initial sovereign condition, but also on their overall international juridical status. Those effects also included the extinction (or substantial reduction) of their territorial base and undermined their political, economic, juridical, cultural and social order in general, and even their survival as a distinct society.

205. These negative effects are perceptible, to a greater or lesser degree, whether or not the relations between these peoples and the colonizers were juridically formalized by means of treaties/agreements.

206. The most lethal of these effects has been, of course, the extinction of these peoples as social entities with distinct identities that has already occurred (or presumably will soon occur).

207. It is impossible to determine with any certainty, in 1998, the number of indigenous peoples which have become extinct since the time of their first encounter with the "discoverers", as the result of the "civilization" imposed on them. Nor is it possible to say how many more will disappear in the not so distant future, unless the circumstances in which they live in multi-national States today do not change.

208. To cite just two known examples, according to all indications, the original inhabitants of Catalina Island off the coast of California and the Yanomamis of Roraima should be included in the category of "peoples in danger of extinction". The relentless carving away of their lands as a result of the most varied actions, their expulsion from these lands (either through the use of direct force by the new State or because they could not obtain the resources to continue practising their traditional economic activities or to continuing tilling the soil), draconian restrictions on the use of their own languages and on the practice of their religious beliefs (or the prohibition of one or both) have contributed, historically and currently to this situation.

209. The effective exercise of their attributes as international subjects had already been effectively liquidated by around the third decade of the twentieth century in all areas of the world in which bilateral treaties between indigenous and non-indigenous peoples had been relatively frequent in the past. This process echoed the United States Senate decision at the beginning of the 1870s, to discontinue treaty-making with indigenous nations and to refuse treaty status to the instruments still awaiting ratification.

210. In this respect, one must also recall the indigenous peoples' unsuccessful attempts (despite President Woodrow Wilson's "14 points") to re-establish recognition of their international status by the League of Nations; or to gain access, in their own right as peoples, to the International Court of Justice, established under the Charter of the United Nations as the principal judicial organ of the new world organization that emerged as a result of the Axis defeat in the Second World War. This was so despite the large number of indigenous soldiers who had contributed to the Allied victory in that war and despite the Preamble to its Charter which declares that the United Nations was established by "the peoples of the United Nations" who through their Governments declared themselves in 1945 "determined to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained" (emphasis added). Furthermore, this was the situation even though the Charter, in formulating one of the purposes of the Organization, recognizes the importance of respect for "the principle of equal rights and self-determination of peoples" (Art. 1.2), a simple, direct and unqualified way of saying all peoples, bar none.

211. In the current contemporary context and in the framework of this same provision of the Charter, it is worth underlining, at least in passing, the patent incongruity in the position of those who used this Charter reference as a basis for legitimizing the decision by some nations formerly part of the today-extinct Soviet Union (for example, the so-called Baltic countries) to secede from it, claiming their status as fully sovereign nations, while at the same time objecting to even a mention of that same right in the context of debates on indigenous issues.

212. This is not the only example of the double-standard treatment indigenous peoples are receiving currently in the United Nations, although the Organization has devoted much greater attention to this issue since 1982, with the establishment of the Working Group on Indigenous Populations. The insurmountable obstacles confronting their efforts to represent themselves fully in bodies of the United Nations system other than the Working Group should be kept in mind. Such was the case in 1989, when ILO discussed and adopted Convention No. 169, which is directly related to their daily living conditions.

213. Moreover, similar difficulties blocked the much-needed full participation of indigenous organizations in the Working Group established by the Commission on Human Rights to elaborate a draft United Nations declaration on the rights of indigenous populations, a forum for which strict rules for participation were instituted that, in fact, limit to a considerable degree the indigenous input into the debate. No similar rules were applied for non-governmental organizations without recognized status with the Economic and Social Council in the case of another working group established by the Commission, that dealing with the rights and responsibilities of "human rights defenders".

214. The constant reduction (or total disappearance) of the territorial base of indigenous peoples not only affected their capacity to survive as peoples but is the source of the most crucial aspect of the "indigenous question" in its current context, that of the right of these peoples to the use, enjoyment, conservation, and transmission to future generations of their ancestral lands; in peace, without outside interference, in accordance with their own uses, customs, and norms of social life. We shall come back to this issue.

215. Once the work of the initial conquistadores/colonizers or their successors was completed, the colonial process advanced towards the gradual or rapid dispossession of indigenous lands.

216. It is not the task of the Special Rapporteur in this final report to describe in detail the harsh impact on indigenous peoples of being subjected to a new and totally alien social, economic, and political-juridical order. Much has been published on the subject by both indigenous and non-indigenous sources (including official government bodies in the States now inhabited by these peoples). He will only attempt to summarize its most relevant effects, some still lingering on even at the end of the twentieth century, and in particular those touching on land rights.

217. It must be stressed, in this regard, that for these peoples their land (from whence they came or where they live today) holds singular spiritual and

material values. It contains for them the essential elements of their cosmogony. It is the ultimate source of life and wisdom. They believe in the collective enjoyment of what it provides; in the inalienability of something not "owned" but "preserved" for future generations. It plays an irreplaceable role in their religious practices. In short, their understanding of the land was (and is) singularly different from that imported by the newcomers and their successors, whose approach, logically, reflected (although not always exactly) the predominant values of their respective societies.

218. Grosso modo, the newcomers and their successors imbued (and imbue) the land with an essentially patrimonial value, making it subject to exclusive individual appropriation (and, thus, capable of being passed on to others at the will of the title holder), a source of material wealth and a basis for political and economic power.

219. The process that took the indigenous peoples' lands from them left behind very limited and debilitating alternatives for survival: vassalage (or servitude in its diverse forms), segregation in reduced areas "reserved" for them, or assimilation into the non-indigenous sector of the new socio-political entity created without indigenous input. The last alternative meant the social marginalization and discrimination prevalent in these mixed societies, about which little or nothing could be done despite praiseworthy efforts by certain non-indigenous sectors.

220. Various methods were utilized to achieve dispossession of the land. They, unquestionably, included treaties and agreements, at least if we accept the non-indigenous interpretation of these documents (and, in general, that version is the only one available in written form). This issue will be returned to later.

221. Coercion - either by armed force or by judicial and legislative means, or both - was very frequently resorted to. This was true whether or not its employment was preceded by formal juridical commitments to the contrary.

222. It went to extremes. An example is the forced exodus in the 1830s to the other side of the Mississippi of the "five civilized tribes" of the south-eastern United States. This is the first documented case of "ethnic cleansing".

223. Another method frequently employed to attain dispossession in cases in which no juridical instruments of any sort had been compacted was to take advantage of the inability of the indigenous peoples (or individuals) to show "property deeds" considered valid under the new, non-indigenous law. This made their ancestral lands vulnerable to seizure by non-indigenous individuals holding such documents (acquired by the most diverse - and, most often, less than honourable - means) or by the central or local authorities, who claimed them as public property (or as lands belonging to the Crown or federal lands) subject to their jurisdiction.

224. The total or partial dispossession of indigenous peoples of their lands (a basic life source in all categories) created new forms of dependency or sharpened pre-existing ones. First, it notably affected the ability of

indigenous authorities to exercise their functions effectively and also the capacity of indigenous societies to be self-sustaining by way of their traditional economic activities. All this had a traumatic impact on their social framework.

225. The new non-indigenous authorities hastened to create a distinct political-administrative order to replace the traditional indigenous authorities and the decision-making mechanisms that had guided these societies for centuries. This was a generally successful effort. However, in multiple cases it could only be achieved with the participation of certain segments of the indigenous societies, already subject to stresses of all types.

226. Similarly, in recent times, the possibility of indigenous participation, as such, in certain aspects of the non-indigenous established political order has opened up some multi-national societies. This is particularly true in the parliamentary area. Examples can be found in Colombia and New Zealand/Aotearoa. The Special Rapporteur welcomes these developments, which appear to be steps in a positive direction. This is particularly true in the case of New Zealand. Its electoral law gives the Maaori population the option (to be freely taken) of registering on the list reserved for them. Still it remains to be seen just how much of a real impact this type of measure will have in the enormous effort required to achieve more just relations between both sectors of these societies.

227. In economic terms, the loss or substantial reduction of their territorial base had lamentable consequences for indigenous peoples. The impossibility of their continuing their traditional economic activities (or the necessity of carrying them out in greatly reduced areas) generated a constant migration to non-indigenous economic centres, in particular to large cities. For very many communities this has meant the loss or severe reduction of their demographic base and, in general, acculturation and progressive loss of indigenous identity by a significant number of their members.

228. Today, in lands still not affected by dispossession - in particular, in those cases where no treaties or agreements exist - there is a continuing and visible impact on the traditional economic activities. This is so because of the juridical insecurity (according to non-indigenous law) of their effective possession of the land and the inroads made by alien technology for the exploitation of natural resources (including the subsoil, rivers, forests and fauna).

229. The list of such cases is long and varied and it is impossible to eumerate them all in this report. It is enough to point out that the great majority of these people eke out an existence in precarious conditions. This is due to a number of factors: the direct threat of forced eviction, in some cases; the obligation at times to obtain licences or permits from non-indigenous administrative authorities to be able to engage in their traditional economic activities (or to be limited by restrictive quotas that do not cover their needs); the obligation, in other cases, to seek authorization from these authorities to make use of natural resources, even when their ownership has been recognized even under non-indigenous law; or, generally, the effects of modern technology on their traditional habitat.

230. The general situation of the Australian aborigines - even after the well-known decision in the Mabo case - and the situations of the Lubicon Cree and Hobbema peoples/nations in Alberta (Canada), the Dene (Navajo) in Arizona (United States), the Crees in James Bay, Québec, many segments of the Maaori peoples in Aotearoa/New Zealand, and the Mapuche in southern Chile are some tangible examples of indigenous peoples living in the precarious economic conditions referred to above.

231. In this respect, it should be mentioned that during his field work among the Cree of Québec (1993) and the Mapuches (1998), the Special Rapporteur was able to confirm, both from personal observation and from vivid testimony, the enormous irreversible damage already caused to, or threatening, the indigenous habitat because of the rerouting or damming of large rivers (such as the upper Bio-Bio or the Great Whale river basin) to build large-scale hydroelectric plants, whose output, by all accounts, is earmarked for consumption by the non-indigenous population (even in other countries).

232. As can be inferred from all of the above, every aspect of the indigenous peoples' socio-cultural life, including, obviously, their religion, has been negatively affected by the overall process of "domestication" (which touches on all areas), as well as by its obligatory corollary, dispossession of and the loss of effective control over their ancestral lands.

233. Whether subject to a system of direct servitude or to a sort of judicial guardianship (or trusteeship) similar to that applied to minors; whether assimilated (or on the way to being assimilated) and marginalized in the new societies; or restricted to small areas surrounded by another, powerful, aggressive and alien culture, or living in other lands on the periphery - in flight from the non-indigenous authority (having lost their own), these peoples have witnessed multiple attacks on their rich social fabric.

234. First, it is important to note the forced separation of families, as children and adolescents were sent, for long periods during their formative years, to religious schools far from their original environment. In those institutions, they were rewarded for accepting assimilation, while any expression of their original identity (such as speaking in their own language) would draw severe punishment, including corporal punishment.

235. Indigenous peoples also saw the destruction of many manifestations of their historical-cultural heritage and the desecration of their cemeteries and other sacred sites. Their archaeological treasures and even the bones of their ancestors are still exhibited today in numerous non-indigenous museums around the world, despite the efforts to recover them, the national laws passed to protect them and the protests of many international organizations.

236. Over the remains of demolished temples there stand impressive cathedrals or other manifestations of the new culture. In addition, the Special Rapporteur has received sound information on at least two attempts in recent years to build golf courses on lands of recognized religious value to indigenous peoples.

237. On no few occasions, and during long periods, their customs, ceremonies and religious practices were simply and categorically prohibited. Moreover,

in many cases they lost access, for diverse reasons, to the places where, according to their traditions, these practices and ceremonies should take place. In one or another of these situations, they have been forced either to celebrate them clandestinely at the risk of serious sanction (the case of Sundance in North America), or (like the slaves brought from Africa to the Caribbean and Brazil) to disguise them ingeniously in alien liturgy, such as that of the Catholic religion, a common phenomenon in Latin America.

238. Their institutions and cultures were considered "inferior", "archaic", and "inefficient and impractical" by non-indigenous sectors. These negative views were promoted daily and urbi et orbis by the most diverse methods ("scientific" literature or simply by word of mouth) and quickly became part of the "conventional wisdom" in large sections of the political and academic world, as well as for vast segments of the population at large, in the plurinational societies in which indigenous peoples continue to live today.

239. Thus, there should be nothing surprising about the desire of a number of indigenous individuals to assimilate, nor about their acceptance of the ethical or material values of the alien society by which they are surrounded. The common root of this evident threat to their survival as distinct peoples can be found in the obvious erosion of self-esteem afflicting certain sectors of diverse indigenous peoples nowadays. This is even true at a stage such as the present one, in which there is also a highly noticeable, vigorous process of recovery and development of these peoples' traditional values.

240. In this regard, it should be pointed out that the lack of employment opportunities and, in general, the inability, in the current circumstances, to achieve sustainable development according to their own traditions has contributed heavily to this loss of self-esteem. This is particularly the case for peoples caught in the "indigenous reserves" system established in the United States and Canada, as well as in other situations in northern Europe and Greenland.

241. All too frequently, the daily reality of indigenous peoples feeds the belief that their survival is possible thanks only to the "subventions" and "services" provided by the State on which they depend. These services may be of greater or lesser quality and coverage, and the assistance may be direct or indirect, but what all these instances have had in commc.. for centuries is that their cost is always, by definition, less than the value of the benefits accrued by the non-indigenous sector with whom they share the society.

242. Finally, it must be stressed that in practically all cases in which indigenous peoples live in modern multi-national States their social development indexes are lower, or less favourable, than those of the non-indigenous sectors with whom they coexist. This is true for some of the most important socio-economic indexes: employment, annual income, prenatal and infant mortality, life expectancy, educational level, percentage of the prison population, suicide rate, etc. Quite regularly, the official figures provided by the competent sources in these countries provide proof of the above assertion.

243. All of the above explains why for more than 15 years the Sub-Commission and the Working Group have dealt with indigenous issues under an item entitled

"Discrimination against indigenous peoples", the same title carried by the seminal study by Mr. Martínez Cobo published 16 years ago. Not much of substance has changed for indigenous peoples since then. The basic elements of their relationships with the non-indigenous world remain unchanged.

244. Nor is it by chance that the Commission, on the very date on which it established the Special Rapporteur's mandate, recognized (in impeccable diplomatic parlance) that "in various situations, indigenous peoples are unable to enjoy their inalienable human rights and fundamental freedoms" (Commission resolution 1989/34 of 6 March 1989, sixth preambular paragraph).

IV. LOOKING AHEAD: CONCLUSIONS AND RECOMMENDATIONS

245. The Special Rapporteur has a number of elements to be duly taken into account at the time of formulating conclusions and recommendations in this final report. The most important are the following:

(a) His own mandate, as established in Commission on Human Rights resolution 1988/56 and Economic and Social Council decision 1988/134;

(b) The outline of the study 53/ submitted to the Working Group's parent bodies and explicitly or implicitly endorsed by them; and

(c) The issues mentioned in the 1982 Martínez Cobo report as possible questions to be elucidated in a study such as the one now being concluded.

246. As far as his mandate is concerned, it must be recalled that the main purpose of the study is to analyse the potential utility of treaties, agreements and other constructive arrangements between indigenous peoples and Governments for the purpose of ensuring the promotion and protection of the human rights and fundamental freedoms of those peoples.

247. His terms of reference also instructed the Special Rapporteur to give "particular attention to the ongoing development of universally relevant standards and the need to develop innovative, forward-looking approaches to relationships between indigenous populations and Governments". In doing so, he was to take into account the inviolability of the sovereignty and territorial integrity of States, as well as their socio-economic realities. The mention of "the ongoing development of universally relevant standards" obviously referred to the process of elaborating a draft declaration on the rights of indigenous peoples, begun in the Working Group in 1985.

248. Regarding the draft declaration, the Special Rapporteur has taken its provisions as a basic point of reference for his conclusions and recommendations, notwithstanding the fact that the process of its final adoption is still unfinished. He has taken very much into account the fact that its text, as it now stands, was adopted after long years of deliberation both in the Working Group and, for some time, in the Sub-Commission as well, with the ample participation of both indigenous representatives and government delegations.

249. As far as issues recognized in the 1988 outline as elements to be addressed at the end of the study are concerned, the Special Rapporteur

identified the role of treaties in European expansion overseas (addressed in chapter III above); the contemporary significance of treaties, agreements, and other constructive arrangements, including questions relating to State succession, national recognition of such instruments, and the views held by indigenous peoples on them. In addition, the outline identified three main sources that were to guide both the process of data gathering and his conclusions and recommendations: public international law; the municipal law of present-day States (including decisions by municipal courts); and indigenous juridical views (in particular, on societal authority, treaties, and treaty-making in general).

250. Special Rapporteur Martínez Cobo thought it convenient to explore further issues as relevant as the areas covered today by the provisions of treaties and other international legal instruments involving indigenous peoples, whether or not they are observed, the consequences of their implementation or lack thereof for indigenous peoples (an issue also addressed in chapter III above), as well as the present status of those legal instruments involving indigenous peoples.

251. At this point, the Special Rapporteur is prepared to offer, first, some general conclusions applicable to the issues of the study as a whole; and then to provide more specific conclusions regarding the two main categories of currently existing situations in which indigenous peoples live in multi-national societies: those in which treaties, agreements or other constructive arrangements exist, and those lacking such juridical instruments.

252. The first general conclusion concerns the issue of recognition of indigenous peoples' right to their lands and their resources, and to continue engaging, unmolested, in their traditional economic activities on those lands. This is the paramount problem to be addressed in any effort to establish a more solid, equitable and durable relationship between the indigenous and non-indigenous sectors in multi-national societies. Owing to their special relationship, spiritual and material, with their lands, the Special Rapporteur believes that very little or no progress can be made in this regard without tackling, solving and redressing - in a way acceptable to the indigenous peoples concerned - the question of their uninterrupted dispossession of this unique resource, vital to their lives and survival.

253. The primacy of this issue is reflected not only in the data gathered for the study and in the personal testimony heard by the Special Rapporteur, but also in the debates held in the Working Group and other international forums. The fact that more than a dozen articles of the draft declaration deal with the question of land rights, and the concerns recently expressed by Vatican sources 54/ on the violence and discrimination exerted, up to the present, against indigenous peoples to deprive them of their lands, are also proof of its primacy.

254. Another conclusion, closely related to the previous one, is that not only the land rights issue, but, in general, the entire indigenous problematique and its possible overall solution cannot be approached exclusively on the basis of juridical reasoning. The problems confronted in a sizeable number of multi-national States are essentially political in essence. Thus, considerable political will is required from all the parties concerned,

but in particular from the non-indigenous political leadership of modern States, if these problems are to be resolved through forward-looking new approaches. Juridical discussions and argumentation simply take too long, require copious resources (which the indigenous side almost always lacks or has only in limited amounts), and in many cases are prejudiced by centuries of sedimented rationale. In addition, the urgency of the existing problems simply leaves no room to engage, at the threshold of the twenty-first century, in the type of juridico-philosophical debates which Las Casas and Sepúlveda pursued in the sixteenth century.

255. The Special Rapporteur is fully convinced that the overall indigenous problematique today is also ethical in nature. He believes that humanity has contracted a debt with indigenous peoples because of the historical misdeeds against them. Consequently, these must be redressed on the basis of equity and historical justice. He is also very much aware of the practical impossibility of taking the world back to the situation existing at the beginning of the encounters between indigenous and non-indigenous peoples five centuries ago. It is not possible to undo all that has been done (both positive and negative) in this time-lapse, but this does not negate the ethical imperative to undo (even at the expense, if need be, of the straitjacket imposed by the unbending observance of the "rule of [non-indigenous] law") the wrongs done, both spiritually and materially, to the indigenous peoples.

256. The Special Rapporteur also harbours no doubts concerning the much debated issue of the right to self-determination. Indigenous peoples, like all peoples on Earth, are entitled to that inalienable right. Article 1 of the Charter of the United Nations gives blanket recognition of this right to all peoples (enshrining it as a principle of contemporary international law, as does article 1 common to both International Covenants on Human Rights. This right is also expressly recognized for indigenous peoples in article 3 of the draft declaration. In the view of the Special Rapporteur, any contradiction that may emerge between the exercise of this right by indigenous peoples in present-day conditions and the recognized right and duty of the States in which they now live to protect their sovereignty and territorial integrity, should be resolved by peaceful means, first and foremost negotiations; through adequate conflict-resolution mechanisms (either existing or to be established); preferably within the domestic jurisdiction; and always with the effective participation of indigenous peoples. We shall return to this issue at a later stage in the present chapter.

257. Regarding the question of whether or not indigenous peoples can be considered as nations - in the sense of contemporary international law - in the context of countries where some indigenous peoples have been formally recognized as such (by non-indigenous nations at the beginning of their contacts or at a later stage) through international legal instruments, such as treaties, and other peoples/nations have not, the Special Rapporteur believes it is pertinent to distinguish between those two situations, although the final analysis may lead to the same conclusion.

258. In reviewing the cases he has selected for analysis the Special Rapporteur has been led to conclude that the vast majority either describe

situations of actual conflict between the indigenous and non-indigenous sectors of society, or contain the seeds of a conflict that could erupt unexpectedly because of issues that have been simmering without appropriate solution for a long period, perhaps even centuries. The developments in Oka (Québec) in 1991, Chiapas (Mexico) in 1994 and in various communities in Australia in 1997 are examples of that potential.

259. Another general conclusion to be made is that, as recognized in the draft United Nations declaration on the rights of indigenous peoples submitted by the Working Group to the Sub-Commission and adopted by the latter, 55/ all the human rights and freedoms recognized in international instruments - either legally binding norms or non-binding standards - accepted by the State in which they now live, are applicable to indigenous peoples and individuals living within their borders. 56/ This also applies to all rights and freedoms recognized in the domestic legislation of the State concerned, for all individuals and social groups under its jurisdiction. In the view of the Special Rapporteur, this is so provided that the manner in which those rights and freedoms are recognized in the instruments in question is consistent with indigenous customs, societal institutions and legal traditions.

260. On the other hand, the Special Rapporteur is inclined to argue in favour of the proposition that treaties/agreements or constructive arrangements have the potential to become very important tools (because of their consensual basis) for formally establishing and implementing not only the rights and freedoms alluded to in the preceding paragraph, but also inalienable ancestral rights, in particular land rights, in the specific context of a given society.

261. On the basis of a vast amount of documentation, the work of the Working Group and oral testimony, the Special Rapporteur has reached the conclusion that there is an almost unanimous opinion among geographically-dispersed indigenous peoples that existing State mechanisms, either administrative or judicial, are unable to satisfy their aspirations and hopes for redress.

262. He also has reasons to conclude that there is a widespread desire on the indigenous side to establish (or re-establish) a solid, new, and different kind of relationship, quite unlike the almost constantly adversarial, often acrimonious relationship it has had until now with the non-indigenous sector of society in the countries where they coexist. In the view of the indigenous peoples, this can only be achieved either by the full implementation of the existing mutually agreed-upon legal documents governing that relationship (and a common construction of their provisions), or by new instruments negotiated with their full participation. This perception is shared by the appropriate government officials in a number of countries, including Canada, New Zealand and Guatemala.

263. Finally, the Special Rapporteur is strongly convinced that the process of negotiation and seeking consent inherent in treaty-making (in the broadest sense) is the most suitable way not only of securing an effective indigenous contribution to any effort towards the eventual recognition or restitution of their rights and freedoms, but also of establishing much needed practical mechanisms to facilitate the realization and implementation of their ancestral

rights and those enshrined in national and international texts. It is thus the most appropriate way to approach conflict resolution of indigenous issues at all levels with indigenous free and educated consent.

264. In his view, it is also the most suitable way for Governments to implement effectively the appeal addressed to them by the 1993 Vienna World Conference on Human Rights to ensure the full and free participation of indigenous peoples in all aspects of society, particularly in matters of concern to them. 57/

265. In the case of indigenous peoples who concluded treaties or other legal instruments with the European settlers and/or their continuators in the colonization process, the Special Rapporteur has not found any sound legal argument to sustain the argument that they have lost their international juridical status as nations/peoples. The treaty provisions which, according to the non-indigenous version and construction, contain express renunciations by indigenous peoples of their attributes as subjects of international law (particularly, jurisdiction over their lands and unshared control of their political power and institutions) are strongly challenged by most indigenous peoples whom he has consulted.

266. Their rejection of those provisions is based either on the existence of invalid consent obtained by fraud and/or of induced error as to the object and purpose of the compact, or on their ancestors' total lack of knowledge of the very existence of such stipulations in the compact, or on the fact that their ancestral traditions and culture simply would not allow them to relinquish such attributes (particularly those relating to lands and governance).

267. The State parties to those compacts - which have benefited the most from gaining jurisdiction over former indigenous lands - argue that those attributes were indeed relinquished, on the basis of provisions of their domestic legislation and decisions of their domestic courts, as well as on the realities of today's world, and of the historical developments leading to the present situation. However, the principle that no one can go against his own acts goes back to ancient Rome and was valid as a general principle of law at the time of the dispossession.

268. In this connection, the Special Rapporteur is very aware of the non-retroactivity of the 1969 Vienna Convention on the Law of Treaties, 58/ which entered into force in 1980. A considerable number of States with indigenous peoples living within their current borders are parties to it. Nonetheless, he has also borne in mind that the text adopted in Vienna has to do not only with the development of new rules and concepts in international law, but also with the codification of those which had survived the test of time and were, in 1969, already part and parcel of international law, either as customary law or as positive law as embodied in a number of already-existing bilateral and/or multilateral international instruments.

269. He believes that the content of article 27 of the Vienna Convention ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty ...") was already a rule of international law at the time when the process leading to the disenfranchisement and

dispossession of indigenous peoples' sovereign attributes was under way, despite treaties to the contrary concluded with them in their capacity as recognized subjects of international law.

270. This leads to the issue of whether or not treaties and other legal instruments concluded by the European settlers and their successors with indigenous nations currently continue to be instruments with international status in the light of international law.

271. The Special Rapporteur is of the opinion that those instruments indeed maintain their original status and continue fully in effect, and consequently are sources of rights and obligations for all the original parties to them (or their successors), who shall implement their provisions in good faith.

272. The legal reasoning supporting the above conclusion is very simple and the Special Rapporteur is not breaking any new ground in this respect. Treaties without an expiration date are to be considered as continuing in effect until all the parties to them decide to terminate them, unless otherwise established in the text of the instrument itself, or unless they are duly declared to be null and void. This is a notion that has been deeply ingrained in the conceptual development, positive normativity and consistent jurisprudence of both municipal and international law since Roman Law was at its zenith more than five centuries ago, when modern European colonization began.

273. As a result of his research, the Special Rapporteur has ample proof that indigenous peoples/nations who have entertained treaty relationships with non-indigenous settlers and their continuators strongly argue that those instruments not only continue to be valid and applicable to their situation today but are a key element for their survival as distinct peoples. All those consulted - either directly in mass meetings with them or in their responses to the Special Rapporteur's questionnaire, or by direct or written testimony - have clearly indicated their conviction that they indeed remain bound by the provisions of the instruments that their ancestors, or they themselves, concluded with the non-indigenous peoples.

274. Competent authorities in some countries, for example, Canada and New Zealand, have also told the Special Rapporteur that their respective Governments too consider that their treaties with indigenous peoples remain fully valid and in effect (although, they differ radically from their indigenous counterparts regarding construction of the content of those treaties).

275. Nonetheless, the Special Rapporteur has been able - in the course of his research and through in situ observation, to ascertain a large number of obvious serious violations of the legal obligations undertaken by State parties to those instruments (in particular, to the so-called "historic treaties" and to legal commitments involving indigenous lands) at practically all stages of the process of domestication described in chapter III, particularly in the second half of the nineteenth century.

276. Probably the most blatant case in point is the United States federal Government's taking of the Black Hills (in the present-day state of

South Dakota) from the Sioux Nation during the final quarter of the nineteenth century. The lands which included the Black Hills had been reserved for the indigenous nation under provisions of the 1868 Fort Laramie Treaty. 59/ It is worth noting that in the course of the litigation prompted by this action, the Indian Claims Commission declared 60/ that "A more ripe and rank case of dishonorable dealing will never, in all probability, be found in our history", and that both the Court of Claims, in 1979, and the Supreme Court of that country 61/ decided that the United States Government had unconstitutionally taken the Black Hills in violation of the United States Constitution. However, United States legislation empowers Congress, as the trustee over Indian lands, to dispose of the said property including its transfer to the United States Government. Since the return of lands improperly taken by the federal Government is not within the province of the courts but falls only within the authority of the Congress, the Supreme Court limited itself to establishing a $17.5 million award (plus interest) for the Sioux. The indigenous party, interested not in money but in the recovery of lands possessing a very special spiritual value for the Sioux, has refused to accept the monies, which remain undistributed in the United States Treasury, according to the information available to the Special Rapporteur.

277. It is well known that fulfilment, in good faith, of legal obligations that are not in contradiction with the Charter of the United Nations (Art. 2.2) is considered one of the tenets of present-day positive international law and one of the most important principles ruling international relations, being, as it is, a peremptory norm of general international law (*jus cogens*). Of course, article 26 of the Vienna Convention on the Law of Treaties has enshrined the principle of *pacta sunt servanda* as the cornerstone of the law of treaties, and mention has already been made above of the importance of article 27 of that Convention.

278. It should also be borne in mind that the draft United Nations declaration on the rights of indigenous peoples expresses the same concept with particular emphasis. In article 36, it establishes that "Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements".

279. On the other hand, the unilateral termination of a treaty or of any other international legally binding instrument, or the non-fulfilment of the obligations contained in its provisions, has been and continues to be unacceptable behaviour according to both the Law of Nations and more modern international law. The same can be said with respect to the breaching of treaty provisions. All these actions determine the international responsibility of the State involved. Many nations went to war over this type of conduct by other parties to mutually agreed upon compacts during the period (from the sixteenth to the late nineteenth century) when the colonial expansion of the European settlers and their successors was at its peak.

280. The Special Rapporteur has also concluded that a number of current conflict situations concerning indigenous treaty/agreement issues have to do with substantial differences in the construction of their provisions, in

particular those relating to the object and purpose of the compact in question. A relevant case is that of the Treaty of Waitangi. The Maaori and Pakeha constructions of it differ in matters as crucial as the alleged "transfers" of governance/sovereignty powers and "land title" to the non-indigenous settlers, as well as on the actual purpose of the compact itself. A well-known scholar 62/ has described how the main British negotiator, having been instructed to secure British sovereignty over Maaori lands in order to exercise exclusive control over them so as to proceed with peaceful colonization, deliberately blurred the meaning of the term "sovereignty" and hid from the Maaori parties the fact that the cession they were agreeing to would ultimately mean a significant loss of Maaori power. Despite the Maaori's confident belief that the treaty had confirmed their right to property, even the more important rights of rangatiratanga would ultimately have to give way to Crown authority.

281. Account should be taken of the fact that indigenous practices of treaty-making were totally oral in nature and there were no written documents in this process. In addition, it was extremely difficult for the indigenous parties to follow all aspects of the negotiations fully through translators (who most likely were not always perfectly accurate), not to mention the fine print in the written version submitted to them, in an alien language, by the non-indigenous negotiators. Further, it was impossible for them, in most instances, to produce a written version of their understanding of the rights and obligations established in the instruments.

282. The Special Rapporteur considers it important to stress that his research revealed that treaties, in particular, concluded with indigenous nations, have frequently played a negative role with respect to indigenous rights. On many occasions they have been intended - by the non-indigenous side - to be used as tools to acquire "legitimate title" to the indigenous lands by making the indigenous side formally "extinguish" those and other rights as well. In a document submitted personally by one respected indigenous chief, 63/ on behalf of his nation, it is noted that treaties on occasion are used to force indigenous peoples to bargain away their ancestral and treaty rights.

283. Finally, considering the very limited data available to him, at this final stage of the study, with respect to treaties between States affecting indigenous peoples as third parties, the Special Rapporteur can offer only the preliminary conclusion that, according to all the evidence, there is no acceptance by the affected indigenous parties of the obligations included in the provisions, 64/ nor any participation by them in the implementation, of such treaties.

284. Something must now be said with respect to the situation of indigenous peoples who have never been formally recognized as nations by means of negotiated formal international juridical instruments with non-indigenous States. Particular attention should be paid to the issue of whether or not they continue today to retain their status as nations in the light of contemporary international law. The key question to be posed in this respect, in the view of the Special Rapporteur, is: by what means could they possibly have been legally deprived of such status, provided their condition as nations was originally unequivocal and has not been voluntarily relinquished?

285. The Special Rapporteur is of the opinion that to link the determination of the "original" legal status of indigenous peoples as nations (in the contemporary sense of international law) or as "non-nations" to the single factor of whether or not they have formalized relations with non-indigenous colonizing powers, is faulty. Not only does it go against the tenets of natural law, but it is also illogical. The fact that some of them did not have juridical relations with the colonial powers - in many cases, during the early stages of a colonizing project, simply because the newcomers did not happen to cross their path - does not appear sufficient reason to establish such a drastic differentiation between their rights and the rights of those who did.

286. It is important to recall that modern non-indigenous law long ago dispelled the theory which advocated that the absence of formal legal/political recognition by one sovereign entity (or a group of them) could determine either the existence or the juridical international status of another. The theory was thrown out as an aberration vis-à-vis the principles of the sovereignty and equal rights of all States. International entities, unrecognized by some members of the international community, continue nevertheless to exercise their attributes as subjects of international law and in doing so may entertain relations with all other interested international subjects. All that is required for this is that the entities possess the necessary elements to be considered international subjects: territory, population, an institutionalized form of government and, thus, the capacity to conclude international agreements.

287. In addition, other non-juridical theories serving as the basis for depriving indigenous peoples, in general, of their original international status have also been discarded in the light of the new perceptions and theoretical elaborations of modern international law. For example, the concept of terra nullius was formally put to rest by the International Court of Justice in its advisory opinion in the Western Sahara case, [65]/ as well as by the well-known 1992 Mabo v. Queensland decision [66]/ handed down by Australia's High Court. Further, the international community has widely repudiated the deprivation of such a status by conquest and armed force. The provisions to that effect in the Charter of the Organization of American States and in Article 2.4 of the Charter of the United Nations prove that contemporary international law rejects the notion that force and conquest may bestow rights.

288. Hence, the Special Rapporteur is of the opinion that should those indigenous people who never entered into formal juridical relations, via treaties or otherwise, with non-indigenous powers (as did other indigenous peoples living in the same territory) wish to claim for themselves juridical status also as nations, it must be presumed until proven otherwise that they continue to enjoy such status. Consequently, the burden to prove otherwise falls on the party challenging their status as nations. In any possible adjudication of such an important issue, due attention should be given to an evaluation of the merits of the juridical rationale advanced to support the argument that the indigenous people in question have somehow lost their original status.

289. Having presented, in the first part of this chapter, the conclusions of this study, the Special Rapporteur will proceed to his final recommendations. As was the case when drafting his conclusions, the Special Rapporteur deems it necessary to recall certain general points of reference - advanced at earlier stages of his work - that should now guide the formulation of these recommendations.

290. The Special Rapporteur considers it useful to recall that, according to his mandate, this study was not to be limited to an analysis of past legal instruments and their contemporary significance, nor to a review of whether or not they are being currently implemented, regardless of the value that such a review might have for both the present and the future.

291. If such an historical overview has been given it is because the Special Rapporteur felt this would help to obtain a well-informed fowa:d-looking approach to the key issue, that is, the need to evaluate the extent to which the conclusion of new treaties, agreements and other constructive arrangements between indigenous populations and States may contribute effectively to the development of more solid, lasting and equitable bases for the relationships that will necessarily have to continue to exist between indigenous populations and States.

292. It should also be borne in mind that the Special Rapporteur has identified the ultimate purpose of his mandate as offering elements towards the achievement, on a practical level, of the maximum promotion and protection possible, both in domestic and international law, of the rights of indigenous populations and especially of their human rights and fundamental freedoms, 67/ by means of creating new juridical standards, negotiated and approved by all the interested parties, in a process tending to contribute to the building of mutual trust 68/ based on good faith, mutual understanding of the otner parties' vital interests, and deep commitment from all of them to respect the eventual results of the negotiations. 69/

293. At this juncture, it is useful to reiterate a point noted earlier in this chapter (para. 257 above): most of the cases/situations reviewed by the Special Rapporteur are either actual conflict situations by definition, or have the potential to erupt into a conflict situation at any time and under the most unexpected circumstances.

294. In this context, the need to encourage and nurture a process of confidence-building can never be overemphasized. It is a process that requires the taking of positive steps as well as the avoidance of actions that would exacerbate existing conflictual situations. The first recommendation of the Special Rapporteur has to do with this much needed process.

295. Steps such as the one taken years ago by the then Prime Minister of Australia, Robert Hawke, recognizing the misdeeds committed by the first settlers against the Aborigines, the recent admission by the Vatican concerning certain aspects of the role played by the Catholic Church at various stages of the colonization of Latin America and the 1993 Apology Bill passed by the United States Congress with respect to Hawaii are positive developments in that direction. The Governments of those States should be

encouraged to undertake effective follow-up to those initial steps. Other Governments in similar circumstances are called upon to be bold enough to undertake like steps in their specific societal context.

296. By the same token, actions that predictably will aggravate existing confrontational situations, or create new conflicts, should be avoided, or should be the subject of an immediate sine die moratorium. Examples of what should not be done, in the view of the Special Rapporteur, abound: forced evictions (as in the case of the Navajo nation in Arizona), the creation of conditions of duress for indigenous peoples to induce them to accept conditions for negotiating (among others, the case of the Lubicon Cree in Alberta), the fragmentation of indigenous nations to pit them against each other (as in cases in the North Island of Aotearoa/New Zealand), the ignoring and bypassing of the traditional authorities by promoting new authorities under non-indigenous regulations (as in a number of cases in the United States), the continuation of "development projects" to the detriment of the indigenous habitat (as in the case of the Bio-Bio River in Chile), attempts to launch major diversions to redirect focus to individual rights as opposed to collective-communal rights (as denounced by the Haudenosaunee Confederacy) and many others. All such actions should be carefully avoided.

297. This approach is consistent with one of the key traits of the original approach of the Special Rapporteur to what was to be the thrust of his conclusions and recommendations, namely to contribute to fostering new relationships based on mutual recognition, harmony and cooperation, instead of an attitude of ignoring the other party, confrontation and rejection.

298. Regarding recommendations to ascertain fully and channel properly the recognized potential of treaties/agreements and other constructive arrangements, as well as of treaty-making (again in its broadest sense), as elements for the regulation of more positive and less antagonistic future relationships between indigenous peoples and States, due account should be taken of two processes already addressed by the Special Rapporteur in the course of his work: (i) the history of treaty relations between indigenous peoples and States, especially the lessons to be drawn from an analysis of the process of domestication in former European settler colonies (see chap. III above); and (ii) the rationale behind ongoing negotiations and certain political processes developing between States and indigenous peoples in various countries.

299. As far as the first of the two processes mentioned above is concerned, the main lesson to be drawn from history concerns the problems of treaty enforcement and implementation. The Special Rapporteur will offer a number of recommendations on this key issue.

300. It is only too obvious that the problem in this area does not lie in the lack of provisions but rather in the failure of the State party to comply with those provisions. A case in point is that of the United States, the country with the largest number (approximately 400) of acknowledged treaties concluded with indigenous nations, most of them forced into oblivion by unilateral actions on the part of either the federal authorities or the Congress.

301. History demonstrates the existence of a wide array of means at the disposal of State bodies, including the judiciary, to disregard unilaterally treaty provisions that place a burden on the State, a disregard that goes hand in hand with the observance of provisions that are favourable to the State party.

302. Regarding the rationale of present-day negotiations and other political contacts between States and indigenous peoples, two observations need to be made. The first has to do with what may be termed "non-negotiables", for example the principle of extinguishment of so-called native title as a condition for the settlement of indigenous claims. It remains to be seen to what extent the existence of such "non-negotiables" - if imposed by State negotiators - compromises the validity not only of the agreements already reached but also of those to come. The free consent of indigenous peoples, essential to make these compacts legally sound, may be seriously jeopardized by this particularly effective form of duress.

303. The second observation concerns the issue of "self-government" and "autonomy" offered in certain cases as a substitute for the full exercise of ancestral rights relating to governance, which are now to be extinguished. In order to avoid new problems in the future, the Special Rapporteur feels the need to recommend that the possible advantages and disadvantages of such regimes be carefully assessed by both parties - but in particular by the indigenous side - in the light of the history of treaty-making and treaty implementation and observance resulting from past negotiations between indigenous nations and States.

304. For the same reasons, it is especially important to assess fully (or to reassess), from the same point of reference, the relevance and potential utility of the quasi-juridical category of "constructive arrangements" for indigenous peoples still deprived of any formal and consensual relationship with the States in which they now happen to live.

305. Regarding recommendations on yet another issue crucial to the forward-looking aspects of this study, it must be noted that the Special Rapporteur, at the beginning of his work, singled out three elements that deserved investigation with respect to mechanisms of conflict resolution. Those three elements were: (i) the actual capability of existing mechanisms to deal promptly and, preferably, in a preventive manner with conflict situations; (ii) the "sensitive issue" of national versus international jurisdiction; and (iii) the manner in which the effective participation in these mechanisms of all parties concerned - in particular that of indigenous peoples - is to be secured. 70/

306. Earlier in the present report (para. 261) the Special Rapporteur noted the generalized opinion that, in the light of the situation endured by indigenous peoples today, the existing mechanisms, either administrative or judicial, within non-indigenous spheres of government have been incapable of solving their difficult predicament. This forces him to advance a number of recommendations on this subject.

307. He first recommends the establishment within States with a sizeable indigenous population of an entirely new, special jurisdiction to deal

exclusively with indigenous issues, independent of existing governmental (central or otherwise) structures, although financed by public funds, that will gradually replace the existing bureaucratic/administrative government branches now in charge of those issues.

308. This special jurisdiction, in his view, should have four distinct specialized branches (permanent and with adequate professional staffing):

(i) an advisory conflict-resolution body to which all disputes, including those relating to treaty implementation, arising between indigenous peoples and non-indigenous individuals, entities and institutions (including government institutions) should be mandatorily submitted, and which should be empowered to encourage and conduct negotiations between the interested parties and to issue the recommendations considered pertinent to resolve the controversy;

(ii) a body to draft, through negotiations with the indigenous peoples concerned: (a) new juridical bilateral, consensual, legal instruments with the indigenous peoples interested and (b) new legislation and other proposals to be submitted to the proper legislative and administrative government branches in order gradually to create a new institutionalized legal order applicable to all indigenous issues and that accords with the needs of indigenous peoples;

(iii) a judicial collegiate body, to which all cases that after a reasonable period of time have not been resolved through the recommendations of the advisory body, should be mandatorily submitted. Such a body should be empowered to adjudicate these cases and should be capable of making its final decisions enforceable by making use of the coercive power of the State;

(iv) an administrative branch in charge of all logistical aspects of indigenous/non-indigenous relations.

309. The Special Rapporteur is fully aware of many of the obstacles that such an innovative, far-reaching approach might encounter. To mention only one, it is not difficult to appreciate the many vested interests that might be affected by the redundancy of the structures now existing to deal with indigenous issues in many countries. Only strong political determination, particularly on the part of the leadership of the non-indigenous sector of the society, can make this approach viable. One other essential element is also clear: the effective participation of indigenous peoples - preferably on a basis of equality with non-indigenous people - in all four of the recommended branches is absolutely central to the "philosophy" presiding over the Special Rapporteur's overall approach to this question.

310. It is obvious that the above is a mere sketch of the new institutionality recommended. Much lies ahead in terms of filling in its quite visible lacunae. While the Special Rapporteur does not lack ideas on how to fill some of the gaps, he has considered it wise to allow for the required fine-tuning to be done at a later stage, around a negotiating table,

by the interested parties themselves in the different countries. The way in which such a negotiation process is organized and conducted may well be the true litmus test eventually of the merits of his recommendation and of the viability of the structure proposed in a given socio-political context.

311. In advancing the recommendations set forth above, the Special Rapporteur has benefited from the highly interesting ideas on the same subject formulated in the final report (1996) of the Royal Commission on Aboriginal Peoples established by the Government of Canada. 71/

312. While it is generally held that contentious issues arising from treaties or constructive arrangements involving indigenous peoples should be discussed in the domestic realm, the international dimension of the treaty problematique nevertheless warrants proper consideration.

313. A crucial question relates to the desirability of an international adjudication mechanism to handle claims or complaints from indigenous peoples, in particular those arising from treaties and constructive arrangements with an international status.

314. The Special Rapporteur is quite familiar with the reticence expressed time and again, by States towards the question of taking these issues back to open discussion and decision-making by international forums. In fact, he might even agree with them that for certain issues (for example, disputes not related to treaty implementation and observance) it would be more productive to keep their review and decision exclusively within domestic jurisdiction until this is completely exhausted.

315. However, he is of the opinion that one should not dismiss outright the notion of possible benefits to be reaped from the establishment of an international body (for example, the proposed permanent forum of indigenous peoples) that, under certain circumstances, might be empowered - with the previous blanket acquiescence, or acquiescence on an ad hoc basis, of the State concerned - to take charge of final decision in a dispute between the indigenous peoples living within the borders of a modern State and non-indigenous institutions, including State institutions.

316. At any rate, the Special Rapporteur recommends that a United Nations-sponsored workshop be convened, at the earliest possible date and within the framework of the International Decade of the World's Indigenous People, to open an educated discussion on the possible merits and demerits of the establishment of such an international body.

317. One last point on the subject: with the growing international concern about all human rights and related developments, one element appears very clear in the mind of the Special Rapporteur: the more effective and developed the national mechanisms for conflict resolution on indigenous issues are, the less need there will be for establishing an international body for that purpose. The opposite is also true: the non-existence, malfunctioning, anti-indigenous discriminatory approach or ineffectiveness of those national institutions will provide more valid arguments for international options. This may be one of the strongest arguments possible for the establishment

(or strengthening) of proper, effective internal channels for the implementation/observance of indigenous rights and conflict resolution of indigenous-related issues.

318. Another recommendation which it seems timely to address to State institutions empowered to deal with indigenous issues is that, in the decision-making process on issues of interest to indigenous peoples, they should apply and construct (or continue to do so) the provisions of national legislation and international standards and instruments in the most favourable way for indigenous peoples, particularly, in cases relating to treaty rights. In all cases of treaty/agreement/constructive arrangement relationships, the interpretation of the indigenous party of the provisions of those instruments should be accorded equal value with non-indigenous interpretation of the same provisions.

319. The Special Rapporteur also recommends the fullest possible implementation in good faith of the provisions of treaties/agreements between indigenous peoples and States, where they exist, from the perspective of seeking both justice and reconciliation. In the event that the very existence (or present-day validity) of a treaty becomes a matter of dispute, a formal recognition of that instrument as a legal point of reference in the State's relations with the peoples concerned would contribute greatly to a process of confidence-building that may bring substantial benefits. In this context, the completion of the ratification process of draft treaties/agreements already fully negotiated with indigenous people is strongly recommended by the Special Rapporteur.

320. In the case of obligations established in bilateral or multilateral treaties concluded by States - to which indigenous peoples are third parties - that may affect those peoples, the Special Rapporteur recommends that the State parties to such instruments seek the free and educated acquiescence of the indigenous parties before attempting to enforce those obligations.

321. The Special Rapporteur further recommends State authorities not to take up or continue to engage in development projects that may impair the environment of indigenous lands and/or adversely affect their traditional economic activities, religious ceremonies or cultural heritage, without previously commissioning the appropriate ecological studies to determine the actual negative impact those projects will have.

322. Finally, in connection with the indigenous affairs-related activities of the Office of the United Nations High Commissioner for Human Rights, the Special Rapporteur recommends:

(a) A substantial permanent increase in the staff assigned to carry out such activities;

(b) The establishment, at the earliest possible date, of a section within the United Nations Treaty Registry with responsibility for locating, compiling, registering, numbering and publishing all treaties concluded between indigenous peoples and States. Due attention should be given in this endeavour to securing access to the indigenous oral version of the instruments in question;

(c) The convening, in the framework of the Programme of Action for the International Decade of the World's Indigenous People and at the earliest possible date, of three workshops on: the establishment of an international conflict-resolution mechanism on indigenous issues; modalities for redressing the effects of the historical process of land dispossession suffered by indigenous peoples; and the implementation/observance of indigenous treaty rights;

(d) Promoting the creation of an Internet page exclusively dedicated to indigenous issues and the United Nations activities relating to indigenous interests.

Notes

1/ E/CN.4/Sub.2/1986/7/Add.4 (also available as United Nations publication, Sales No. E.86.XIV.3).

2/ Ibid., paras. 388-392.

3/ E/CN.4/Sub.2/1987/22, annex I (Recommendations to the Sub-Commission), Recommendation 3.

4/ E/CN.4/Sub.2/1988/24/Add.1.

5/ E/CN.4/Sub.2/1991/33.

6/ E/CN.4/Sub.2/1992/32, E/CN.4/Sub.2/1995/27 and E/CN.4/Sub.2/1996/23.

7/ E/CN.4/Sub.2/1988/24, Add.1, paras. 21-23.

8/ E/CN.4/Sub.2/1991/33, paras. 92-93, 106-107, and 110-114.

9/ E/CN.4/Sub.2/1992/32, para. 169.

10/ E/CN.4/Sub.2/1988/24/Add.1, para. 12; E/CN.4/Sub.2/1991/33, para. 92.

11/ E/CN.4/Sub.2/1991/33, paras. 95-100; for implementation, see E/CN.4/Sub.2/1995/27, paras. 48-129. It must be mentioned that the language barrier made it impossible for the Special Rapporteur to review the scanty information available to him in the case of the indigenous peoples of Siberia.

12/ E/CN.4/Sub.2/1992/32, para. 326.

13/ 1155 United Nations, Treaty Series, vol. 1155, No. 331, article 2 1 (a).

14/ E/CN.4/Sub.2/1992/32, para. 332.

15/ E/CN.4/Sub.2/1995/27, paras. 288, 293.

16/ E/CN.4/Sub.2/1995/27, para. 314.

17/ E/CN.4/Sub.2/1992/32, paras. 367-370.

18/ These were: the 1494 Treaty of Tordesillas, the 1713 Treaty of Utrecht, the 1751 Border Treaty between Sweden/Finland and Norway/Denmark, the 1763 Treaty of Paris, the 1794 Jay Treaty, the 1819 Adam-Onis Treaty, the 1848 Treaty of Guadelupe-Hidalgo, the 1867 Purchase of Alaska, the 1916 Migratory Birds Convention and the 1989 ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries (see E/CN.4/Sub.2/1992/32, paras. 363-390).

19/ Further review of issues relating to this type of consensual compact will be made in chapter II.B of this report.

20/ E/CN.4/Sub.2/1995/27, paras. 140-171.

21/ E.g. Sharon Venne, "Understanding Treaty Six: indigenous perspective", in Aboriginal and Treaty Rights in Canada (M. Asch Ed.) (Vancouver: University of British Columbia Press, 1996), pp. 173-204; Treaty Seven Elders and Tribal Council, The Original Spirit and Intent of Treaty Seven, Montreal and Kingston, McGill-Queen's University Press, 1996.

22/ E/CN.4/Sub.2/1991/33, para. 98; for implementation, see E/CN.4/Sub.2/1995/27, paras. 48-129. Compare also infra, chapter II below.

23/ E/CN.4/1995/27, para. 126.

24/ E/CN.4/Sub.2/1995/27, para. 116.

25/ Sub-Commission resolution 1994/4 of 19 August 1994.

26/ E/CN.4/Sub.2/1995/27, paras. 116, 128.

27/ E/CN.4/Sub.2/1995/27, para. 307.

28/ Study of the Problem of Discrimination Against Indigenous Populations, vol. V: "Conclusions, proposals and recommendations", document E/CN.4/Sub.2/1986/7/Add.4, paras. 388-392.

29/ It should be noted, however, that the Special Rapporteur has from the beginning repeatedly deplored (see for example, E/CN.4/Sub.2/1995/27, para. 32.), the very limited response to his questionnaire from indigenous nations/organizations, a situation which improved considerably after 1995 as a result of the efforts by some organizations, such as the International Indian Treaty Council. In addition, he has also had to contend with the widespread lack of response from Governments concerned to their version of the questionnaire. Of the very few replies received, some were of a merely general or formal nature, with little substance.

30/ Cf. E/CN.4/Sub.2/1992/32, para. 392.

31/ E/CN.4/Sub.2/1991/33, para. 89.

32/ E/CN.4/Sub.2/1992/32, paras. 32, 40.

33/ Cf. E/CN.4/Sub.2/1995/27, para. 336.

34/ E/CN.4/Sub.2/1995/27, para. 133.

35/ He had nevertheless identified a small number of documents relating to situations in South America which "date back to early republican days in at least two countries"; see E/CN.4/Sub.2/1991/33, paras. 103-104.

36/ E/CN.4/Sub.2/1996/23, paras. 145-170. In February 1998, Mapuche authorities in their lands in the present-day Chilean province of Cautín solemnly submitted copious documentation relating to a number of those parlamentos to the Special Rapporteur. Until June 1998, only an initial review of that documentation had been possible.

37/ E/CN.4/Sub.2/1992/32, paras. 138-139; see also E/CN.4/Sub.2/1995/27, para. 130.

38/ E/CN.4/Sub.2/1995/27, paras. 176-201, 202-237 and 238-249.

39/ E/CN.4/Sub.2/1996/23, paras. 27-79, 81-115 and 145-170.

40/ E.g. Sébastien Grammond, Les traités entre l'Etat canadien et les peuples autochtones, Cowansville, Québec, Editions Yvon Blais, 1995; Francis P. Prucha, American Indian Treaties, The History of a Political Anomaly, Berkeley, University of California Press, 1994.

41/ Report of the Royal Commission on Aboriginal Peoples, vol. 2, "Restructuring the Relationship", Part One, Recommendation 2.2.2, Ottawa, Minister of Supply and Services, 1996, p. 49.

42/ E/CN.4/Sub.2/1995/27, paras. 130-311; E/CN.4/Sub.2/1996/23, paras. 27-209.

43/ E/CN.4/Sub.2/1991/33, para. 96.

44/ E/CN.4/Sub.2/1992/32, para. 347.

45/ E/CN.4/Sub.2/1996/23, paras. 171-196.

46/ E/CN.4/Sub.2/1996/23, paras. 117-125 and 126-144.

47/ Cf. E/CN.4/Sub.2/1992/32, para. 338.

48/ E/CN.4/Sub.2/1996/23, paras. 85-115. In the view of the Special Rapporteur, the fact that a non-State negotiator (the Canadian province of Québec) later became a "party" to this instrument cannot be construed as depriving it of its basic international standing. On the other hand, indigenous parties to it had never ceded their sovereign attributes before the existence of this Convention, and their participation in this treaty-making process cannot and should not be considered as an action depriving them of such attributes and original status.

49/ By the same token, the Special Rapporteur wishes to correct an error of generalization he made in paragraph 87 of his third progress report (E/CN.4/Sub.2/1996/23), regarding the Déné and Métis of the Mackenzie Valley (Northwest Territories).

50/ E/CN.4/Sub.2/1992/32, para. 359.

51/ Cf. E/CN.4/Sub.2/1995/27, para. 225.

52/ Commission on Human Rights resolution 1988/56, para. 2, and Economic and Social Council decision 1988/134.

53/ E/CN.4/Sub.2/1988/24/Add.1.

54/ Pontificio Consejo "Justicia y Paz", Para una Mejor Distribución de la Tierra: El reto de la reforma agraria, Libreria Editrice Vaticana, Vatican City, 1997, para. 55.

55/ Sub-Commission resolution 1994/45 of 26 August 1994, annex.

56/ See article 1 of the draft declaration.

57/ Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993 (A/CONF.157/23), Part II, para. 31.

58/ Article 4 of the Convention. See note 13 above.

59/ U.S. Stat. 635 (1868).

60/ 207 Ct. Cl. at 241, 518 F.2d at 1302 (1975).

61/ United States v. Sioux Nation of Indians, 448 U.S. 371 (1980).

62/ Claudia Orange, The Treaty of Waitangi, Allen & Unwin, Wellington, 1987, pp. 32-33 and 122.

63/ Chief Oren Lyons of the Haudenosaunee Confederacy. The document was submitted personally to the Special Rapporteur in February 1998.

64/ Article 35 of the Vienna Convention on the Law of Treaties makes such an acceptance indispensable for an obligation to be established for third parties to any treaty.

65/ Western Sahara, Advisory Opinion of 16 October 1975: I.C.J. Reports 1975, p. 12.

66/ 175 C.L.R. 1 (1992).

67/ E/CN.4/Sub.2/1988/24/Add.1, para. 10, and E/CN.4/Sub.2/1991/33, para. 71.

68/ E/CN.4/Sub.2/1988/24/Add.1, para. 14.

69/ E/CN.4/Sub.2/1991/33, para. 85.

70/ E/CN.4/Sub.2/1991/33, para. 118.

71/ Report of the Royal Commission on Aboriginal Peoples, vol. 2, "Restructuring the relationship", Part One, Ottawa, Minister of Supply and Services, 1996.